

2688

No. 12850

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United States  
Court of Appeals  
for the Ninth Circuit.

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JOSEPH G. WHITE,

Appellant,

vs.

FRANCIS F. QUITTNER, Trustee in Bank-  
ruptcy of the Estate of AL HERD, Bankrupt,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
Southern District of California,  
Central Division.

FILED  
APR 11 1951

PAUL K. O'BRIEN.

GLENN



No. 12850

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

FRED HOROWITZ,

ALVIN F. HOWARD,

325 West Eighth St.,

Los Angeles 14, Calif.

For Appellee:

MARVIN WELLINS,

DANIEL A. WEBER,

325 West Eighth Street,

Los Angeles 14, Calif.



In the District Court of the United States, Southern  
District of California, Central Division

No. 45176 BH

In the Matter of

The Estate of AL HERD,

Bankrupt.

PETITION TO QUIET TITLE TO FUNDS IN  
THE POSSESSION OF THE TRUSTEE

To the Honorable Benno M. Brink, Referee in  
Bankruptcy, United States District Court,  
Southern District of California, Central Division:

The petition of Francis F. Quittner respectfully  
shows:

I.

That he is the duly appointed, qualified and acting  
Trustee in Bankruptcy herein.

II.

That on or about March 3, 1949, the Referee  
entered an order approving the First Report and  
Account of the Trustee herein.

III.

That the Trustee has on hand a sum slightly in  
excess of \$7,000.00 which is available for immediate  
distribution to preferred creditors herein.

## IV.

That petitioner has been notified by Mr. Fred Horowitz, attorney for one Joseph G. White, that he asserts a claim in and to the sum of \$6,220.00 paid to petitioner upon a judgment recovered in an action entitled "George L. Gibbons vs. Joseph G. White," in the Superior Court of Los Angeles County, case No. 533,306, which judgment was entered August 25, 1948, in the amount of \$6,035.75.

## V.

That petitioner desires to quiet title in and to the aforesaid proceeds in his possession in order that he may effect immediate distribution thereof to the preferred creditors entitled thereto.

Wherefore, petitioner prays that an Order to Show Cause issue herein, requiring said Joseph G. White, or his representatives, to show cause, if any he have, before the Referee herein, on September 6, 1949, at 10 a.m., why an order should not be entered herein quieting title in and to the proceeds in the possession of the petitioner herein; and requiring said Joseph G. White to serve and file his Answer to this petition, setting forth his claim, if any, in and to said funds or proceeds, on or before August 26, 1949.

Dated August ..., 1949.

/s/ FRANCIS F. QUITTNER,  
Petitioner.



State of California,  
County of Los Angeles—ss.

Francis F. Quittner being by me first duly sworn, deposes and says: that he is the Petitioner in the above-entitled proceeding; that he has read the foregoing Petition to Quiet Title to Funds in the Possession of the Trustee and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 19th day of August, 1949.

[Seal]      /s/ G. ABRAMSON,  
Notary Public in and for Said County and State of  
California.

[Endorsed]: Filed August 20, 1949.

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[Title of District Court and Cause.]

ORDER TO SHOW CAUSE TO QUIET TITLE  
TO FUNDS IN POSSESSION OF TRUSTEE

Upon the annexed verified petition of the Trustee in Bankruptcy herein, and sufficient cause appearing therefor,

It Is Hereby Ordered that Joseph G. White show cause, if any he have, before the undersigned

Referee in Bankruptcy, at his court room, Federal Building, Los Angeles, California, on the 6th day of September, 1949, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein quieting the title of the Trustee in Bankruptcy herein in and to the funds and proceeds in his possession.

It Is Further Ordered that said Joseph G. White shall, on or before the 26th day of August, 1949, serve upon the attorneys for the Trustee and file his Answer to this petition, setting forth his claim, if any, in or to said funds or proceeds in the possession of the Trustee herein.

It Is Further Ordered that service of a copy of this Order to Show Cause and the annexed Petition by mail upon said Joseph G. White on or before the 20th day of August, 1949, or delivery thereof in person to the office of Mr. Fred Horowitz, attorney for said Joseph G. White, on or before said date, shall be deemed good and sufficient service and notice thereof.

Dated at Los Angeles, California, this 20th day of August, 1949.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed March 20, 1949.

[Title of District Court and Cause.]

AMENDED ANSWER TO ORDER  
TO SHOW CAUSE

Respondent, Joseph G. White, having obtained leave of court to file this, his Amended Answer to Order to Show Cause setting forth his claim to funds or proceeds in the possession of the Trustee herein, respectfully shows:

I.

For a considerable period of time prior to this bankruptcy proceeding, the bankrupt was borrowing money from one George Gibbons.

II.

On or about May 1, 1947, George Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, Respondent, Joseph G. White, as a gratuitous accommodation to the bankrupt, gave George Gibbons his promissory note in the sum of \$5000.00 in consideration of which the aforesaid attachment was released.

III.

On August 12, 1947, George L. Gibbons commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled, "George L. Gibbons vs. Joseph G. White, et al," No. 533306. Said action was to collect the aforesaid promissory note in the principal sum of \$5000.00, plus interest and attorney fees. An an-

swer was filed on behalf of Joseph G. White and the case was set for trial on August 26, 1948. George L. Gibbons was therein represented by the law firm of Jones and Wiener.

#### IV.

On or about December 24, 1947, the Trustee herein commenced an action in the United States District Court against the aforesaid Gibbons, claiming that Gibbons had charged the bankrupt usurious rates of interest and that Gibbons secured an unlawful preference when he received the said White note in the sum of \$5000.00. In connection with said action, the Trustee caused White to be served with a garnishment, specifically referring to the sum due from White to Gibbons under the aforesaid accommodation note in the sum of \$5000.00. During the month of June, 1948, the Trustee herein, acting through his attorneys, Marvin Wellins and Daniel A. Weber, compromised and settled his aforesaid action against Gibbons. In said settlement, among other things, it was agreed by and between Gibbons and the Trustee that the said note in the sum of \$5000.00 would be the property of the Trustee and that the Trustee would prosecute for his own benefit the said action against White commenced by Gibbons. At the time of making said settlement with Gibbons, the Trustee's attorneys were aware that if White knew that the Trustee had become the real party in interest in the said action originally commenced by Gibbons against White, that White would be able to assert offsets

and defenses which were available to him against the Trustee but not against Gibbons. The particulars concerning said offsets and defenses are set forth in the following paragraph. The attorneys for the Trustee thereupon adopted a scheme to conceal from White and from the Superior Court of the State of California the fact that the Trustee had become the owner of said note and had become the real party in interest in said action so as to prevent White from having an opportunity to assert his claims.

#### V.

The aforesaid note of White to Gibbons in the sum of \$5000.00 was executed by White as an accommodation for Herd, and White received no consideration for its execution. In addition to the execution of said note, White also executed a note in favor of Morris Plan Bank of California in the sum of \$25,000.00, without consideration, as an accommodation for the bankrupt. As evidence of his obligation to White under the aforesaid two accommodation notes, the bankrupt gave White his note in the sum of \$30,000.00. No part of said \$30,000.00 has been paid to White.

#### VI.

On July 13, 1948, Daniel A. Weber and Marvin Wellins, as attorneys and agents for the Trustee herein, but representing themselves as the attorney for George L. Gibbons, caused a motion for summary judgment to be served and filed in said Superior Court action.



## VII.

In support of said motion for summary judgment said attorneys, acting for and on behalf of said Trustee, caused an affidavit of George L. Gibbons to be filed wherein it was stated that the motion was his motion and that Marvin Wellins and Daniel A. Weber were his present attorneys, although said attorneys well knew that the motion was not his but that of the Trustee herein, and that they were not his attorneys but were, in truth, representing the Trustee.

## VIII.

The aforesaid affidavit and representation made to White and to the Superior Court of the State of California that Gibbons was the real party in interest in the Gibbons action at the time said motion for summary judgment was heard, were made for the purpose of denying to respondent Joseph G. White the opportunity of urging the defense that the note sued upon was an accommodation note and that there was an offset on account of the said \$30,000.00 note executed by Herd in favor of White, which defense and offset, as the attorneys for the Trustee then knew, were not available to White in an action prosecuted by Gibbons but were available to White in an action prosecuted by the Trustee, all as set forth in the "petition for allowance to attorneys for Trustee" at page 21 as follows:

"Preferring not to bring about a change in parties in the Gibbons suit against White by substitution of the Trustee as plaintiff (with

consequent danger of affording White an opportunity to offset claims assertable against the Trustee but not against Gibbons), petitioners elected to continue the action in the name of Gibbons and to have the Trustee take an assignment of the entire proceeds which may be recovered in said action.”

### IX.

In reliance on the aforesaid false affidavit and misrepresentation of said attorneys, judgment was awarded by the Superior Court to George L. Gibbons in said action in the sum of \$5000.00, plus interest in the sum of \$500.00, plus attorney's fees in the sum of \$500.00, plus costs; and Joseph G. White paid the sum of \$6220.00 in satisfaction of said judgment.

### X.

Said sum of \$6220.00 was paid to Marvin Wellins, who acknowledged receipt thereof as attorney for the Trustee herein and as attorney for George L. Gibbons, knowing that he did not represent George L. Gibbons but represented said Trustee only. Marvin Wellins, as agent for said Trustee, at said time represented to White that he would, and he did, acknowledge receipt as attorney for said Trustee so as to relieve Joseph G. White of any liability to the Trustee under the aforesaid garnishment referred to in paragraph IV hereof, for the purpose of leading said White to believe that he

represented Gibbons in said transaction, although this was not true.

Wherefore, respondent Joseph G. White prays that said Trustee pay over to said respondent said sum of \$6220.00.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,  
Attorneys for Joseph G.  
White.

State of California,  
County of Los Angeles—ss.

Joseph G. White, being by me first duly sworn, deposes and says: that he is the respondent in the above-entitled action; that he has read the foregoing Amended Answer to Order to Show Cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 16th day of December, 1949.

[Seal] /s/ MARGARET L. DAVIS,  
Notary Public in and for the County of Los Angeles, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 19, 1949.



[Title of District Court and Cause.]

TRUSTEE'S REPLY TO AMENDED ANSWER  
OF RESPONDENT WHITE IN PROCEED-  
INGS TO QUIET TITLE

Comes Now the trustee in bankruptcy herein and for his reply to the amended answer of respondent Joseph G. White in proceedings to quiet title, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I.

II.

Admits that on or about May 1, 1947, George L. Gibbons commenced an action against the bankrupt in the Superior Court of Los Angeles County, State of California, for the recovery of moneys loaned; that on or about May 19, 1947, respondent White gave said Gibbons his promissory note in the sum of \$5,000.00; that thereafter an attachment which had previously issued in said action was released; that on or about August 12, 1947, said Gibbons commenced an action against respondent White in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "George L. Gibbons, plaintiff, vs. Joseph G. White, defendants, et al., case No. 533,306 (hereinafter referred to as the "promissory note action"); that said action was brought to collect the aforesaid promissory note in the principal sum of \$5,000.00 given by respondent White to said Gibbons, plus interest and attorney's

fees; that an answer was filed on behalf of respondent White in said action and that the case was thereafter set for trial on August 26, 1948; and that Gibbons was originally represented in said action by the law firm of Jones & Wiener. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraphs II and III.

### III.

Admits that on or about December 24, 1947, the trustee herein commenced an action in the United States District Court for the Southern District of California, Central Division, against the said Gibbons, case No. 7870-Y, alleging that the bankrupt had made usurious payments of interest to Gibbons upon certain loans, and that Gibbons had secured an unlawful preference in connection with said promissory note in the sum of \$5,000.00; that in said action the trustee caused to be served upon respondent White on or about the 13th day of April, 1948, a garnishment of the debt owing from the respondent White to Gibbons by reason of said promissory note; and that during the month of June, 1948, the trustee herein, acting through his attorneys, Marvin Welins and Daniel A. Weber, with leave of this Court, and upon an order after hearing on notice to creditors, compromised and settled the trustee's aforesaid action against Gibbons. Except as expressly admitted herein, the trustee denies generally and specifically each and every allegation contained in paragraph IV.

## IV.

Admits that respondent White executed a promissory note payable to Morris Plan Bank of California in the sum of \$25,000.00 and that a promissory note in the sum of \$30,000.00 was executed and delivered by the bankrupt to respondent White. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph V, and expressly denies that the \$5,000.00 note alleged therein was executed by White as an accommodation for Gibbons or Herd, and further expressly denies that White received no consideration for the execution thereof.

## V.

Admits that on or about July 13, 1948, Messrs. Marvin Wellins and Daniel A. Weber, acting as attorneys for George L. Gibbons, plaintiff in the promissory note action, caused a motion for summary judgment to be served and filed therein; that in support of said motion for summary judgment said attorneys, acting for and on behalf of the plaintiff in said action, to wit, George L. Gibbons, caused an affidavit of George L. Gibbons to be filed therein stating that said motion for summary judgment was his motion, i.e., plaintiff's motion; and that Messrs. Marvin Wellins and Daniel A. Weber were his attorneys in connection therewith. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph VII.

## VI.

Admits that the petition filed by Messrs. Wellins and Weber in this Court for an allowance to them as attorneys for the trustee in bankruptcy herein contained substantially the quoted portion set forth in paragraph VIII of the amended answer of respondent White. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph VIII.

## VII.

Admits that judgment was awarded by the Superior Court of Los Angeles County to the plaintiff in said action, to wit, George L. Gibbons, in the sum of \$5,000.00, plus interest in the sum of \$500.00, plus attorneys' fees in the sum of \$500.00, plus costs; that Joseph G. White paid the sum of \$6,220.00 in satisfaction of said judgment. Except as expressly admitted herein the trustee denies generally and specifically each and every allegation contained in paragraph IX.

## VIII.

Admits that on December 14, 1948, said sum of \$6,220.00 by checks by respondent White in satisfaction of said judgment was delivered to Marvin Wellins, who thereupon acknowledged receipt thereof as one of the attorneys for the trustee herein, and as one of the attorneys for George L. Gibbons as plaintiff in said action. Except as expressly admitted herein, the trustee denies generally and specifically each and every allegation contained in paragraph X.

As and for a First, Separate and Distinct Defense,  
the Trustee Alleges:

I.

On or about August 25, 1948, a judgment was entered in the Superior Court of the State of California, County of Los Angeles, in said promissory note action, entitled "Gibbons vs. White," case No. 533,306, which judgment was entered in Book 1954, Page 37 of Judgments, in the office of the County Clerk of the County of Los Angeles. By said judgment it was adjudged that the plaintiff in said action, to wit, George L. Gibbons, recover from the defendant the sum of \$6,035.75.

II.

The defendant in said action, who is the respondent White in this proceeding, appeared in said action, filed an answer to the complaint, and litigated the issues raised therein.

III.

Among the issues necessarily determined in said action were the issues of the plaintiff's (Gibbons) title in and to said promissory note, his right to maintain said action, and his right to recover judgment upon said promissory note.

IV.

By said judgment said issues were adjudicated and determined in favor of the plaintiff.



## V.

No appeal has ever been taken from said judgment, and the same became and was at all times until the same was paid, satisfied and discharged by respondent White on December 17, 1948, a final, valid and subsisting judgment.

## VI.

By reason of the foregoing, the issues raised and tendered by respondent White in respect to the funds in the possession of the trustee herein, and the matters and transactions alleged in the amended answer, are *res judicata*, and respondent White is concluded thereby; and respondent White is estopped and precluded from relitigating any of said issues or matters, or from asserting any claim, counterclaim or offset in respect thereto, or to said funds, or the cause of action underlying said judgment.

As and for a Second, Separate and Distinct Defense,  
the Trustee Further Alleges:

## I.

The trustee incorporates herein by reference each and every allegation contained in the First Separate and Distinct Defense herein set forth.

## II.

Thereafter and on or about December 17, 1948, respondent White, who was the defendant and judgment-debtor in said promissory note action, paid

the sum of \$6,220.00 in full satisfaction and discharge of said judgment.

III.

By reason thereof, respondent White is estopped and precluded from making any attack upon said judgment, or from asserting any claim, counterclaim or offset in respect thereto, or to said funds, or the cause of action underlying said judgment.

As and for a Third, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference paragraphs I and II of his Second, Separate and Distinct Defense herein set forth.

II.

At the time respondent White paid, satisfied and discharged said judgment as aforesaid, he knew that the proceeds of said judgment inured and belonged to, and had been assigned by Gibbons to the trustee in bankruptcy herein.

III.

By reason of the premises respondent White is estopped and precluded in this proceeding, or in any other proceeding, from recovering the proceeds of said payment from the trustee in bankruptcy herein.

As and for a Fourth Separate and Distinct Defense,  
the Trustee Further Alleges:

I.

On or about March 16, 1948, the trustee in bankruptcy herein filed an action in the Superior Court of Los Angeles County, State of California, case No. 542,157, against the respondent, who was the defendant in said action, for an accounting by the defendant of all matters and transactions between the bankrupt and the respondent in respect to the bankrupt's business conducted at 7077 Sunset Boulevard, Los Angeles, California. (Said action is hereinafter referred to as the "accounting action.")

II.

Among the issues and transactions involved in said action was the existence or non-existence of a partnership relation between the bankrupt and the respondent, and the nature, extent and character of the payments made by the respondent White, and evidences of indebtedness executed by respondent White to, for or in connection with the bankrupt or the bankrupt's business.

III.

On or about April 12, 1948, the respondent (defendant in said accounting action) filed his answer therein and said action was thereupon fully litigated and final judgment entered therein on May 16, 1949, in favor of the respondent White, adjudging that the plaintiff (trustee) take nothing by his complaint.



## IV.

The alleged indebtedness of the bankrupt to respondent White asserted in the respondent's amended answer herein, arose out of the transactions directly involved in said accounting action; and that the claim or counterclaims of respondent White asserted herein arose out of the transactions set forth in the complaint in said accounting action as the foundation of the plaintiff's claim in said action.

## V.

At no time in said action did the respondent, either in his pleading or during the trial or at any other time, assert any claim, counterclaim or cross-complaint against the bankrupt or the trustee in bankruptcy herein.

## VI.

By reason of the premises, the respondent is estopped and precluded under and by virtue of section 439 of the Code of Civil Procedure of the State of California, from maintaining any proceeding upon, or asserting or claiming any indebtedness, offsets or counterclaims alleged in the respondent's amended answer herein.

As and for a Fifth, Separate and District Defense,  
the Trustee Further Alleges:

## I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to V inclusive of the First, Separate and Distinct De-

fense, and paragraph II of the Second, Separate and Distinct Defense set forth herein.

## II.

On or about July 15, 1948, Messrs. Wellins and Weber, as attorneys for plaintiff George L. Gibbons, in said promissory note action, filed a motion for summary judgment, which motion was noticed for hearing in Department 35 of said Superior Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

## III.

Prior to August 16, 1948, respondent White and his attorneys in said promissory note action, knew that any and all proceeds which might be recovered in said action would inure and belong to, and had been assigned by Gibbons, to the trustee in bankruptcy herein.

## IV.

On or about August 13, 1948, with knowledge of the foregoing facts, Messrs. Horowitz & Howard, attorneys for the defendant in said proceeding (respondent White), served an amended answer to the complaint in said action wherein they failed to assert or make any defense, offset, counterclaim or cross-complaint in connection with the matters hereinbefore alleged, or any of the matters alleged in the amended answer filed in this proceeding by respondent White.

## V.

On or about August 16, 1948, said motion for

summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard, of counsel for defendant White in said action.

#### VI.

Plaintiff's motion for summary judgment was thereupon granted and judgment was thereafter entered in said action on August 25, 1948, pursuant to the order of said Court granting said motion for summary judgment.

#### VII.

Pursuant to the request of Messrs. Horowitz & Howard, attorneys for the defendant in said action, said Superior Court granted a twenty-day stay of execution upon said judgment.

#### VIII.

At no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action, or his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the matters hereinbefore alleged, or the matters alleged in the respondent's amended answer in this proceeding.

#### IX.

By reason of the premises, the respondent is precluded and estopped from asserting all or any of the matters alleged in his amended answer herein.

As and for a Sixth, Separate and Distinct Defense,  
the Trustee Further Alleges:

I.

On or about May 3, 1948, the trustee filed a verified petition with the Referee in Bankruptcy herein for leave to compromise the aforesaid suit theretofore brought by the trustee against Gibbons in the United States District Court, Southern District of California, Central Division, case No. 7870-Y. In said petition to compromise, the trustee set forth the terms of the proposed settlement offer made by Gibbons to the trustee, said petition reading in part as follows (page 3, lines 25-32):

“In addition, defendant (meaning Gibbons) agreed to transfer to the above estate all his right, title and interest in and to a certain promissory note dated May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney’s fees, executed by one Joseph G. White, which note is the subject of a pending action in the Superior Court of Los Angeles County, brought by defendant against said White. The estate, in its discretion, is given the alternative of an assignment of any recovery by defendant in said action.” (Parenthetical words added.)

II.

In addition thereto, the proposed written settlement offer made by Gibbons to the trustee was attached to said petition as Exhibit A thereof, which settlement offer reads in part as follows:

“In addition thereto, I agree to transfer and assign to you (meaning the trustee) all my right, title and interest in and to that certain promissory note heretofore executed by Joseph G. White to me, dated on or about May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney’s fees; or in the alternative, all my right, title and interest in and to any recovery by me thereunder. You shall have the right to determine whether or not the assignment shall cover the note or the proceeds of any recovery in the action now pending thereon.” (Parenthetical words added.)

### III.

Pursuant to the prayer of said petition, a notice of hearing was thereupon sent by the office of the Referee to all listed or known creditors of the bankrupt, which note was dated May 6, 1948. Said notice set forth, among other things, the terms of said offer of settlement, including the substance of the language of the petition to compromise quoted and set forth in paragraph I of this defense. Said hearing was noticed for May 19, 1948.

### IV.

On May 19, 1948, said petition to compromise the trustee’s action against Gibbons came on for hearing; and, the petition was thereupon granted without opposition.

### V.

On May 25, 1948, an order was entered by the

Referee in Bankruptcy herein confirming said compromise, which order reads in part as follows (Page 2, lines 9 to 18):

“\* \* \* upon the further condition that the said George L. Gibbons shall have executed and delivered to the trustee on or before June 15, 1948, an Assignment of any and all proceeds which may be recovered or which may be entitled to be recovered by the said George L. Gibbons in a certain suit pending in the Superior Court, Los Angeles County, State of California, against one Joseph G. White in connection with a certain promissory note, dated May 19, 1947, in the sum of Five Thousand Dollars (\$5,000.00), plus interest and attorney's fees, said Assignment to be in form approved by 'Trustee.'”

#### VI.

Pursuant to said order confirming said compromise, Gibbons executed an assignment to the trustee, dated “June . . . , 1948,” of all his right, title and interest in and to any recovery in his then pending action against White upon said promissory note.

#### VII.

Thereafter, and on or about June 16, 1948, the trustee filed his petition with the referee in bankruptcy herein, for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener, as attorneys for the plaintiff, to wit, George L. Gibbons, in the promissory note action aforesaid,



which petition reads in part as follows (Page 2, lines 2 to 8):

“That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber be substituted as attorneys for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White, in the Superior Court, Los Angeles County, bearing No. 533306.”

#### VIII.

On or about June 16, 1948, an order was entered by the Referee in Bankruptcy herein authorizing said substitution of attorneys.

#### IX.

Thereafter, and pursuant to said order authorizing such substitution of attorneys, a copy of the substitution of attorneys, duly executed by Marvin Wellins and Daniel A. Weber, George L. Gibbons, and Jones & Wiener, was served by mail on July 13, 1948, upon Messrs. Cannon & Callister, who were then the attorneys of record for the respondent White in said promissory note action, and the original of said substitution, duly executed as aforesaid, was filed in the office of the County Clerk of Los Angeles County on July 19, 1948.

#### X.

At all times herein mentioned, respondent White

and his attorneys in said action knew of the pendency of these bankruptcy proceedings and that Messrs. Wellins and Weber, the successor attorneys for the plaintiff in said promissory note action, were also the attorneys for the trustee in bankruptcy herein.

### XI.

The respondent and his attorneys were negligent in failing to examine the files and records of the referee in bankruptcy herein, which examination, in the exercise of reasonable diligence, should have been made.

### XII.

An examination of the files in the above bankruptcy proceedings in the office of the Referee in Bankruptcy herein would have disclosed fully and completely to respondent White, or his attorneys, or other representatives, the full facts in respect to the trustee's acquisition of an interest in, and the assignment by Gibbons to the trustee of, the recovery, if any, in the promissory note action aforesaid, and all other facts spread upon the records of this court as aforesaid.

### XIII.

By reason of the foregoing, the respondent is estopped and precluded from asserting, maintaining or claiming his ignorance of the trustee's interest in the recovery in said promissory note action, and all or any of the matters alleged in his amended answer herein.



As and for a Seventh, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to IX inclusive of the Sixth, Separate and Distinct Defense.

II.

Under and by virtue of Section 385 of the Code of Civil Procedure of the State of California, the plaintiff in said action, to wit, George L. Gibbons, was the proper party to maintain and continue said action, and to prosecute the same as plaintiff, and was at all times the real party in interest therein.

As and for an Eighth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

At no time has the respondent ever filed a claim against the bankrupt in these bankruptcy proceedings, and that the time for the filing of creditor's claims herein has expired.

II.

By reason thereof, the claims set forth in the respondent's amended answer are not maintainable against the trustee in bankruptcy herein.

As and for a Ninth, Separate and Distinct Defense,  
the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to XII inclusive of the Sixth, Separate and Distinct Defense, and paragraph I of the Eighth, Separate and Distinct Defense herein set forth.

II.

By reason of the premises, respondent White is estopped and precluded from asserting or claiming ignorance of the trustee's interest in and to the proceeds of said recovery, or of any of the facts herein set forth, of which he would have had notice if his alleged claim had been filed in the above bankruptcy proceedings; and from charging or imputing to the trustee any breach of duty in allegedly failing to notify the respondent independently of the foregoing matters spread upon the records of this court, and of which all creditors whose claims were duly filed had notice.

As and for a Tenth, Separate and Distinct Defense,  
the Trustee Further Alleges:

I.

There is a defect of parties in this proceeding in that the plaintiff and judgment-creditor in said promissory note action, to wit, George L. Gibbons, is not a party to this proceeding, and that he resides outside the jurisdiction of this court, to wit, in the State of Arizona.

As and for an Eleventh, Separate and Distinct Defense, the Trustee Further Alleges:

I.

That the amended answer of the respondent White is insufficient as a matter of law and fails to state a claim upon which relief can be granted.

As and for a Twelfth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

That the Referee in Bankruptcy has no jurisdiction to grant the relief prayed for by the respondent White.

As and for a Thirteenth, Separate and Distinct Defense, the Trustee Further Alleges:

I.

The trustee incorporates herein by reference each and every allegation contained in paragraphs I to VI inclusive of the First Affirmative Defense herein.

II.

That by reason of the premises, respondent White is barred from relief under the provisions of Section 473, C.C.P.

As and for a Fourteenth, Separate and Distinct Defense, The Trustee Further Alleges:

I.

That the trustee incorporates herein by reference each and every allegation contained in each and every paragraph of the First Affirmative Defense

herein, as well as the Fourth Affirmative Defense herein.

## II.

That the respondent White has delayed unreasonably in presenting and filing his alleged claim herein, and by reason thereof that the respondent White is barred by laches from asserting the same.

As and for a Fifteenth, Separate and Distinct Defense, the Trustee Further Alleges:

## I.

That the respondent White is barred from asserting or recovering on his alleged claim herein by reason of the provisions of Sections 68 and 57g. of the Bankruptcy Act. That the alleged claim of respondent White is not a mutual debt or credit between the estate of the bankrupt herein and the said White. That the alleged claim of the respondent White is not provable against the estate of the bankrupt herein, and that said claim is not allowable against the estate of the bankrupt herein under and by virtue of the aforesaid provisions of the Bankruptcy Act.

Wherefore, the trustee prays that the respondent take nothing under his amended answer, and that the claims asserted by said respondent be dismissed, and that an order be entered herein quieting title in trustee in and to the funds and moneys in his possession in the above estate.

MARVIN WELLINS and  
DANIEL A. WEBER,

By /s/ MARVIN WELLINS,  
Attorneys for Trustee in  
Bankruptcy.

/s/ FRANCIS F. QUITTNER,  
Trustee in Bankruptcy.

State of California,  
County of Los Angeles—ss.

Francis F. Quittner, being by me first duly sworn, deposes and says: that he is the Trustee in Bankruptcy herein in the above-entitled action; that he has read the foregoing Trustee's Reply to Amended Answer of Respondent White in Proceedings to Quiet Title, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 24th day of January, 1950.

[Seal] /s/ SIDNEY R. TROXELL,  
Notary Public in and for Said County and State of  
California.

Receipt of Copy Acknowledged.

[Endorsed]: Filed January 25, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW IN PROCEEDINGS TO QUIET  
TITLE

The trustee in bankruptcy herein having filed a petition on August 20, 1949, requiring respondent Joseph G. White to show cause why the trustee's title in and to the funds in his possession should not be quieted and requiring said respondent to set forth his claim, if any, in or to said funds; and an order to show cause bearing said date having issued by the undersigned Referee in Bankruptcy directed to said respondent; the respondent having filed an "answer" herein on August 24, 1949, and thereafter an "amended answer" on December 18, 1949, and the trustee having filed a "reply" to said amended answer on January 25, 1950; and the proceeding having duly come on for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy herein, on October 4, 1949, January 27, 1950, and January 31, 1950, Fred Horowitz and Alvin F. Howard having appeared as attorneys for said respondent, and Marvin Wellins and Daniel A. Weber having appeared as attorneys for the trustee in bankruptcy herein; after hearing the allegations and proofs of the parties and being fully advised in the premises, the following findings of fact and conclusions of law, constituting the decision of the Court in said proceeding, are hereby made:



## Findings of Fact

## I.

For a considerable period of time prior to this bankruptcy proceeding, the bankrupt was borrowing money from one George Gibbons.

## II.

On or about May 1, 1947, George Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, Respondent, Joseph G. White, as a gratuitous accommodation to the bankrupt, gave George Gibbons his promissory note in the sum of \$5000.00 in consideration of which the aforesaid attachment was released.

## III.

On August 12, 1947, George L. Gibbons commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled: "George L. Gibbons v. Joseph G. White, et al.," No. 533306. Said action was to collect the aforesaid promissory note in the principal sum of \$5000.00, plus interest and attorney fees. An answer was filed on behalf of Joseph G. White and the case was set for trial on August 26, 1948. George L. Gibbons was therein represented by the law firm of Jones and Wiener.

## IV.

That on or about December 24, 1947, the Trustee herein commenced an action in the United States District Court for the Southern District of Cali-



fornia, Central Division, case number 7870-Y, against George L. Gibbons, claiming that said Gibbons had charged the bankrupt usurious rates of interest on the loans referred to in Paragraphs I and II hereof, and that Gibbons had procured an unlawful preference when he received the said promissory note dated May 19, 1947, executed by Respondent to Gibbons in the sum of \$5000.00. In said action, the plaintiff therein, to wit, the Trustee in Bankruptcy herein, caused to be issued a garnishment in the amount of \$4,617.38, which garnishment was personally served upon the respondent on April 13, 1948, as a debtor of said Gibbons in said sum of \$5000.00.

#### V.

During the month of May, 1948, pursuant to an order of the Referee in Bankruptcy herein, dated May 25, 1948, the Trustee herein and George L. Gibbons compromised the claim asserted by the Trustee in the action referred to in Finding No. IV. By said compromise it was agreed, among other things, that Gibbons would assign to the Trustee all of his right, title and interest in the aforesaid \$5000.00 note and in the action thereon. The Trustee, so as to avoid affording respondent an opportunity to assert possible claims which might have been assertable against the Trustee but not against Gibbons, did not disclose to respondent the interest of the Trustee in said \$5000.00 note or in the aforesaid promissory note action. The Trustee herein and his attorneys in doing the things referred to in

this paragraph acted honestly and in good faith and in the diligent pursuit of the best interests of the bankrupt estate and its creditors.

#### V—A

That the interest of the trustee in bankruptcy herein under and by virtue of said assignment was acquired by the trustee in bankruptcy herein after the filing of the petition in bankruptcy in the above-entitled proceedings; and that the trustee in bankruptcy herein acquired his interest thereunder for a valuable consideration furnished by the trustee.

#### VI.

That thereafter, and on or about June 16, 1948, the Trustee filed his petition with the Referee in Bankruptcy herein for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener, as attorneys for the plaintiff, to wit, George L. Gibbons, in the promissory note action aforesaid, which petition reads in part as follows (page 2, lines 2 to 8):

“That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber be substituted as attorneys, for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White, in the Superior Court, Los Angeles County, bearing No. 533306.”

## VII.

That on or about June 16, 1948, an order was made by the Referee in Bankruptcy herein authorizing said substitution of attorneys, and thereafter and pursuant to said order a copy of the Substitution of Attorneys, executed by Marvin Wellins and Daniel A. Weber, George L. Gibbons and Jones & Wiener, was served by mail on July 13, 1948, upon Messrs. Cannon & Callister, who were then the attorneys of record for the respondent in said promissory note action, and the original of said Substitution of Attorneys, executed as aforesaid, was filed in the office of the County Clerk of Los Angeles County on July 19, 1948. At all times Marvin Wellins and Daniel A. Weber represented the Trustee herein in said promissory action and did not at any time represent George L. Gibbons, the original plaintiff in said action.

## VIII.

That pursuant to said order of the Referee in Bankruptcy herein, dated May 25, 1948, confirming the trustee's aforesaid compromise with Gibbons, the Trustee in Bankruptcy herein released and relinquished any and all claims in favor of the Trustee in Bankruptcy herein against said Gibbons; that said Gibbons thereafter paid to the Trustee in Bankruptcy herein, pursuant to said compromise, \$3,000.00 in cash; and that Gibbons filed a stipulation in the above-entitled bankruptcy proceedings on July 14, 1948, withdrawing his claim theretofore filed in the sum of \$19,500.00 against the above estate.

## IX.

That on or about July 15, 1948, Messrs. Wellins and Weber, ostensibly as attorneys for plaintiff, George L. Gibbons, but actually as attorneys for the Trustee herein, filed a motion for summary judgment in said promissory note action, which motion was noticed for hearing in Department 35 of said Superior Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

## X.

That on or about August 13, 1948, without knowledge of the compromise referred to in Paragraph V of these Findings, Messrs. Horowitz and Howard, attorneys for defendant (White) in said promissory note action (respondent in this proceeding), served a proposed amended answer and proposed cross-complaint in said promissory note action alleging that Gibbons had practiced fraud upon White in connection with White's execution of said promissory note to Gibbons. Said proposed amended answer and proposed cross-complaint did not assert any defense, claim, counterclaim or cross-complaint arising out of any of the claims alleged in the amended answer filed by White in this proceeding.

## XI.

That on or about August 16, 1948, said motion for summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard, of counsel for defendant White in said action.

## XII.

That plaintiff's motion for summary judgment was thereupon granted, and an order of said Court granting said motion for summary judgment was thereupon entered.

## XIII.

That on or about August 25, 1948, a judgment was entered in the Superior Court of the State of California, County of Los Angeles, in said promissory note action, entitled "Gibbons v. White," case No. 533306, which judgment was entered in book 1954, Page 37 of Judgments, in the office of the County Clerk of the County of Los Angeles. On or about December 14, 1948, said judgment in the sum of \$6220.00 was paid by respondent, and said \$6220.00 is now in the possession of the Trustee herein.

## XIII—A.

That at no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action (respondent here), or his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the claims or matters alleged in the respondent's amended answer in this proceeding.

## XIII—B.

That no appeal has ever been taken from said judgment, and the same became and was, at all times until the same was paid, satisfied and discharged by respondent as aforesaid, a final, valid and subsisting judgment.



## XIII—C.

That no action or other legal proceeding was brought, filed or instituted by the respondent in respect to said judgment in the promissory note action or the proceeds of recovery therein prior to the filing of respondent's answer in this proceeding on August 24, 1949.

## XIV.

That on or about March 16, 1948, the Trustee in Bankruptcy herein filed an action in the Superior Court of Los Angeles County, State of California, case No. 542157 against the respondent, who was the defendant in said action, based on an alleged oral agreement of partnership by and between the respondent and the bankrupt. Final judgment was entered in said action on May 16, 1949, in favor of the respondent adjudging that there was no oral or other agreement of partnership between respondent and the bankrupt, and that plaintiff, the trustee herein, take nothing by his complaint. That in said action the respondent asserted no affirmative claim, counterclaim or cross-complaint against the bankrupt or the trustee in bankruptcy herein.

## XIV—A.

That at no time (except in the instant proceeding) has the respondent ever filed any claim or proof of claim, absolute, contingent, secured or otherwise, against the bankrupt or the bankrupt's estate in the above-entitled bankruptcy proceedings.

## XV.

That on the date of the filing of the petition in bankruptcy in the above-entitled bankruptcy proceedings, to wit, August 6, 1947, said Gibbons was the owner and holder of said promissory note in the sum of \$5,000.00 executed and delivered by respondent to Gibbons; and on said date the trustee in bankruptcy herein had no right, title or interest of any kind in or to said note, or the cause of action evidenced thereby, or the proceeds of any recovery thereon.

## XVI.

That on or about the same date that respondent made and executed the aforesaid \$5000 promissory note in favor of Gibbons, he also, as an accommodation to the bankrupt, made and executed a negotiable promissory note in favor of Morris Plan Bank of California in the sum of \$25,000, and the bankrupt made and executed to respondent a non-negotiable promissory note in the sum of \$30,000 as evidence of his obligation to respondent under the aforesaid two accommodation notes. That on the date of the filing of said petition in bankruptcy, respondent had not paid either of said notes executed by him, to wit, said promissory note in the sum of \$5000, nor the promissory note in the sum of \$25,000.00; nor had the respondent made any payment on account of either of said notes. The bankrupt at no time made any payment on said \$30,000 note, which is still unpaid. That on the date of the filing of the petition in bankruptcy in the above-entitled proceedings, the aforesaid promis-



sory note in the sum of \$30,000.00, executed and delivered by the bankrupt to respondent had not yet matured or become due or payable.

## XVII.

That neither respondent nor his attorneys had knowledge prior to the month of March, 1949, of the aforesaid compromise by the trustee herein of his aforesaid action against Gibbons.

## XVIII.

All of the allegations contained in the fifteen affirmative defenses set forth in Trustee's Reply filed herein are true, except all of the allegations contained in the following paragraphs, all of which are untrue: Paragraph VI of the First Affirmative Defense; Paragraph III of the Second Affirmative Defense; Paragraphs II and III of the Third Affirmative Defense; Paragraphs I, II, IV and VI of the Fourth Affirmative Defense; Paragraphs III and IX of the Fifth Affirmative Defense; Paragraphs X, XI and XIII of the Sixth Affirmative Defense; Paragraph II of the Seventh Affirmative Defense; Paragraph II of the Eighth Affirmative Defense; Paragraph II of the Ninth Affirmative Defense; Paragraph I of the Tenth Affirmative Defense; Paragraph I of the Eleventh Affirmative Defense; Paragraph I of the Twelfth Affirmative Defense; Paragraph II of the Thirteenth Affirmative Defense; and Paragraph II of the Fourteenth Affirmative Defense.

## Conclusions of Law

## I.

The Trustee herein was the real party in interest as party plaintiff in the action entitled "Gibbons v. White," No. 533306 of the Superior Court in and for the County of Los Angeles, State of California, from and after the time that this Court approved the Trustee's compromise of his claim against Gibbons on May 25, 1948. The Trustee's failure to disclose his interest in said action prevented respondent herein from asserting any offsets, defenses or claims which may have existed in his favor against the Trustee and respondent was entitled to have an opportunity to assert said offsets, defenses or claims.

## II.

The trustee's claims in and to said assignment and said proceeds are derived from Gibbons and not from the bankrupt.

## III.

The interest of the Trustee in the aforesaid promissory note action when considered in connection with the matters asserted in the respondent's amended answer herein do not involve mutual debts or mutual credits, nor can the matters asserted in the respondent's amended answer defeat the Trustee's interest under said assignment or his right to said proceeds.

IV.

The Affirmative Defenses I to XIV, inclusive, set forth in Trustee's Reply to Amended Answer are without merit.

V.

The Trustee is entitled to judgment and decree quieting title in him and to the aforesaid funds and monies in his possession and determining that the respondent has no interest therein.

Dated this 5th day of April, 1950.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 5, 1950.

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[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S PETITION  
TO QUIET TITLE TO FUNDS IN TRUS-  
TEE'S POSSESSION

The petition of the trustee in bankruptcy in the above-entitled matter having come regularly on for hearing on October 4, 1949, January 27, 1950, and January 31, 1950, before the Honorable Benno M. Brink, Referee in Bankruptcy herein; Fred Horowitz and Alvin E. Howard, having appeared as attorneys for said respondent herein, and Marvin Wellins and Daniel A. Weber, having appeared as attorneys for the trustee in bankruptcy herein, and evidence, both oral and documentary, having been received, the Court being fully advised in the prem-

ises, having made and entered findings of fact and conclusions of law, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That the trustee is the sole owner of all funds now in his possession and that the respondent, Joseph G. White, has no right, title or interest in or to any funds in the possession of the trustee.

Dated this 5th day of April, 1950.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed April 5, 1950.

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[Title of District Court and Cause.]

### PETITION FOR REVIEW

To Benno M. Brink, Esq., Referee in Bankruptcy:

Your petitioner, Joseph G. White, respectfully represents:

#### I.

Your petitioner is aggrieved by the Order herein of Benno M. Brink, Referee in Bankruptcy, dated April 5, 1950, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof.

#### II.

The Referee erred in respect to said Order in that the Referee's Finding V—A, that the Trustee in

bankruptcy herein acquired his interest in the \$5000.00 note and action based on said note for a valuable consideration furnished by the Trustee, is not supported by the evidence and is contrary to the evidence in that the evidence showed that said note and legal action were acquired in consideration of the Trustee's dismissal of the action referred to in Finding IV, which action was based on an assertion of rights belonging to and furnished by the Bankrupt.

### III.

The referee erred in respect to said Order in that the Referee's Finding XV is erroneous. Finding XV declares that on the date of the filing of the petition in Bankruptcy herein, the Trustee in Bankruptcy had no right, title or interest of any kind in or to the aforesaid promissory note and cause of action. Said declaration is not supported by the evidence and is contrary thereto in that the evidence shows that said note was an accommodation note upon which the bankrupt was the party primarily liable and the bankrupt had an interest in said note in that it was delivered without consideration, being a payment on a usurious claim, so that the bankrupt had a right to secure the return and cancellation of said note on said date.

### IV.

The Referee erred in respect to said Order in that Conclusion II, to the effect that the Trustee's claims in and to the aforesaid note and action based thereon were derived from Gibbons and not from

the bankrupt, is contrary to the law and is not supported by any findings of fact made by the Referee, nor by any that could be made under the evidence, because the trustee's claims were in fact claims which would have belonged to the bankrupt had there been no bankruptcy.

V.

The Referee erred in respect to said Order in that Conclusion III is contrary to the law and not supported by the findings of fact nor by any findings of fact which could have been made under the evidence.

VI.

The Referee erred in respect to said Order in that Conclusion V is contrary to the law and not supported by the findings of fact nor by any findings of fact which could have been made under the evidence.

Wherefore, petitioner prays for review by a Judge of this Court of the said Order of the Referee of April 5, 1950, and that upon such review, the said Order be reversed, the cause be remanded to the Referee with directions forthwith to make and enter an Order requiring the trustee to pay to petitioner the sum of \$6220.00, and for such other and further relief as the Court deems proper.

Dated: April 13, 1950.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Petitioner.



State of California,  
County of Los Angeles—ss.

Joseph G. White, being first duly sworn, deposes and says: I am the petitioner named in the foregoing petition. I have read the said petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 14th day of April, 1950.

[Seal]      /s/ MARGARET L. DAVIS,  
Notary Public in and for  
Said County and State.

Note: Petitioner requests that the following papers, or certified copies thereof, be transmitted to the Judge on this review:

1. Petition to quiet title to funds in possession of the trustee.
2. Amended answer to order to show cause.
3. Trustee's reply to amended answer of respondent White in proceedings to quiet title.
4. Order approving trustee's petition to quiet title to funds in trustee's possession dated April 5, 1950.
5. Findings of fact and conclusions of law in proceedings to quiet title.



6. All exhibits received in evidence at the hearings on the aforesaid petition to quiet title to funds in trustee's possession.

7. Reporter's transcript of proceedings at said hearings or a summary of the evidence in lieu thereof.

### EXHIBIT "A"

In the District Court of the United States, Southern  
District of California, Central Division

No. 45176 BH

In the Matter of  
The Estate of AL HERD,

Bankrupt.

### ORDER APPROVING TRUSTEE'S PETITION TO QUIET TITLE TO FUNDS IN TRUS- TEE'S POSSESSION

The petition of the trustee in bankruptcy in the above-entitled matter having come regularly on for hearing on October 4, 1949, January 27, 1959, and January 31, 1950, before the Honorable Benno M. Brink, Referee in Bankruptcy herein; Fred Horowitz and Alvin F. Howard, having appeared as attorneys for said respondent herein, and Marvin Wellins and Daniel A. Weber, having appeared as attorneys for the trustee in bankruptcy herein, and evidence both oral and documentary having been received, the Court being fully advised in the premises, having made and entered findings of fact and

conclusions of law, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That the trustee is the sole owner of all funds now in his possession and that the respondent, Joseph G. White, has no right, title or interest in or to any funds in the possession of the trustee.

Dated this 5th day of April, 1950.

BENNO M. BRINK,  
Referee in Bankruptcy.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 14, 1950.

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[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION  
FOR REVIEW OF ORDER IN RE DE-  
MAND OF JOSEPH G. WHITE FOR  
REPAYMENT OF MONEY PAID TO  
TRUSTEE IN BANKRUPTCY

To the Honorable Ben Harrison, Judge of the  
Above-Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

Joseph G. White has duly filed his petition for the review of an order made by your Referee in this

matter, on April 5, 1950, in which he ruled that the said Joseph G. White was not entitled to recover from the trustee in bankruptcy herein the sum of \$6,220.00 which he had previously paid to the said trustee.

### The Proceedings

This review results from proceedings had before your Referee in which White, the petitioner on review, sought to recover from Francis F. Quittner, the trustee in bankruptcy herein, the sum of \$6,220.00 which White had previously paid to the trustee pursuant to a judgment rendered in an action in the Superior Court of Los Angeles County which had been instituted by one Gibbons against White.

Prior to this bankruptcy, White, at the request of the bankrupt who was then in dire financial straits, gave Gibbons his note for \$5,000.00 to apply on the bankrupt's then existing indebtedness to Gibbons. At about the same time, White, at the solicitation of the bankrupt, gave his note for \$25,000.00 to Morris Plan Bank of California for and on behalf of the bankrupt.

White received no consideration for either of the said notes but, at the time, the bankrupt gave White his note for \$30,000.00 as evidence of the indebtedness on the part of the bankrupt which resulted from the giving by White of the said notes for \$5,000.00 and \$25,000.00 respectively. Nothing was ever paid on the said \$30,000.00 note.

In due course, Gibbons commenced the aforesaid

action in the Superior Court of Los Angeles County against White to collect the said \$5,000.00 note.

After the commencement of this bankruptcy proceeding, the trustee herein filed an action against Gibbons in the United States District Court upon the ground that he had collected certain usurious interest payments from the bankrupt and upon the further ground that he had received a preference, voidable in bankruptcy, when the aforesaid \$5,000.00 note was given to him. In the said action the trustee caused to be issued a garnishment in the sum of \$4,617.38, which garnishment was served upon White, as a debtor of Gibbons upon the aforesaid \$5,000.00 note. In due time, with the approval of your Referee, the said action against Gibbons was settled and compromised. As a result, the trustee released all of his claims against Gibbons and he, Gibbons, among other things, transferred to the trustee his aforesaid action against White which was then pending in the Superior Court of Los Angeles County. It is the contention of the trustee that Gibbons assigned only the proceeds of the said action but your Referee ruled otherwise and held that from and after the approval of the said compromise the trustee was the real party plaintiff in the said action. After the compromise, the attorneys for the trustee in this bankruptcy proceeding prosecuted the said action to judgment in the name of Gibbons as plaintiff. In satisfaction of such judgment, White paid the trustee the sum of \$6,220.00 and it is this payment which he seeks to recover here. The receipt which was given to White for the

said payment was signed by the attorneys for the trustee as "Attorneys for George L. Gibbons, in Case No. 533306, (the aforesaid action by Gibbons against White in the Superior Court of Los Angeles County) and Attorneys for Francis F. Quittner, Trustee in Bankruptcy of Al Herd, bankrupt."

During the course of this bankruptcy proceeding, the trustee herein brought suit against White in the Superior Court of Los Angeles County upon an alleged oral agreement of partnership between White and the bankrupt. The case went to trial and judgment resulted therein in favor of White.

After White had paid the trustee herein the aforesaid sum of \$6,220.00 he, the trustee, learned that White might institute proceedings to recover the said payment. Thereupon, in order to bring the matter on for determination the trustee, on August 20, 1949, filed in this proceeding his petition for an order to show cause requiring White to show cause why an order should not be entered quieting title in and to the funds held by the trustee and requiring White to answer the trustee's petition and to set forth therein any claim he might have in or to the said funds in the hands of the trustee. An order to show cause was duly issued upon the trustee's said petition and on August 24, 1949, White filed his answer in the matter in which he asserted (1) that the aforesaid \$5,000.00 note was a gratuitous accommodation to the bankrupt; (2) that counsel for the trustee herein had concealed from White the fact



that the trustee had become the owner of the said note and was, therefore, the real party in interest in the aforesaid action which had been commenced by Gibbons in the Superior Court of Los Angeles County; (3) that, accordingly, White was denied the opportunity in said action of asserting offsets and counterclaims which were available against the trustee; and (4) that, consequently, White was entitled to recover the aforesaid sum of \$6,220.00 which he had paid pursuant to the judgment in the said action.

The Matter was first heard by your Referee on October 4, 1949. At said time, counsel for the trustee contended that White was estopped and precluded from seeking to recover the money he had paid to the trustee and, thereupon, your Referee announced that before going into the merits of White's claim for the repayment of his money your Referee would first determine if White could have asserted any defenses or counterclaims against the trustee in the aforesaid Gibbons action if the trustee had caused himself to be substituted as party plaintiff in the said case.

After taking this phase of the matter here involved under submission, your Referee ruled that White had not had his day in Court on the questions here presented and that, accordingly, your Referee would hear and determine White's claim that he was entitled to recover the aforesaid money he had paid to the trustee.

Thereafter, White, with leave of this Court, filed

an amended answer and, later, the trustee filed his reply thereto.

White's position may be summarized thusly: That the aforesaid \$5,000.00 note was not enforceable against him by the trustee in bankruptcy in this proceeding because (1) White was merely an accommodation maker for the bankrupt on the said note, and (2) the said note was offset by the aforesaid \$30,000.00 note which had been given to White by the bankrupt and which was wholly unpaid and unsatisfied.

The trustee's position was (1) that the \$5,000.00 note was enforceable against White by the trustee in this case, and (2) that, in any event, White was estopped and precluded in the matter here before the Court (a) by the final judgment in the aforesaid Gibbons action and (b) by White's failure, in the aforesaid "partnership" suit to assert his right to recover the money which he had paid to the trustee pursuant to the judgment in the Gibbons action.

Your Referee heard the matter here involved on its merits on January 27th and January 31, 1950, and thereupon ruled that White was not estopped or precluded from asserting his right to the relief which he sought in this proceeding but your Referee further ruled that the \$5,000.00 note in the hands of the trustee in bankruptcy in this matter was enforceable against White and that he had no offset thereto and that, consequently, he could not recover the money he had paid in satisfaction of the judgment which had been rendered upon the said note.



On April 5, 1950, your Referee filed his findings of fact and conclusions of law and his order in the matter and it is from the said order that this review is taken.

### The Questions Presented

The questions presented by this review are set forth in detail in paragraphs II-VI, both inclusive, of the petition for review which is going up with this certificate but, in the opinion of your Referee, the said questions may be summarized as follows:

(1) Was the \$5,000.00 note here in question enforceable against White by the trustee in bankruptcy in this proceeding?

(2) Was the \$5,000.00 note in the hands of the trustee offset by the bankrupt's indebtedness to White as evidenced by the \$30,000.00 note hereinbefore mentioned?

### The Evidence

The evidence in this matter will be found in the reporter's transcripts and in the exhibits in the case, all of which are going up with this certificate.

### Referee's Findings of Fact, Conclusions of Law and Order

The originals of your Referee's Findings of Fact and Conclusions of Law and Order in this matter are going up with this certificate.

## Papers Submitted

The following papers are transmitted herewith:

1. Petition to Quiet Title to Funds in the Possession of the Trustee, filed August 20, 1949.
2. Order to Show Cause to Quiet Title to Funds in Possession of Trustee, filed August 20, 1949.
3. Answer to Order to Show Cause, filed August 24, 1949.
4. Affidavit in Reply to Statements made in Answer of Joseph G. White, etc., filed October 3, 1949.
5. Affidavit in Opposition to Claim of Joseph G. White, filed October 3, 1949.
6. Points and Authorities in Opposition to Claim of Joseph G. White, etc., filed October 3, 1949.
7. Respondent's Opening Brief, filed October 15, 1949.
8. Trustee's Reply Brief, filed October 22, 1949.
9. Respondent's Reply Brief, filed November 9, 1949.
10. Trustee's Supplemental Reply Brief, filed November 23, 1949.
11. Amended Answer to Order to Show Cause, filed December 19, 1949.
12. Trustee's Reply to Amended Answer of Respondent White, etc., filed January 25, 1950.
13. Objections to Proposed Findings of Fact and Conclusions of Law, filed March 8, 1950.
14. Trustee's Memorandum in Reply to Objections to Trustee's Proposed Findings; and objections to Proposed Findings of Respondent White, filed March 25, 1950.

15. Memorandum of Objections to Revised Findings submitted by Respondent Joseph G. White, filed April 1, 1950.

16. Findings of Fact and Conclusions of Law in Proceedings to Quiet Title, filed April 5, 1950.

17. Order Approving Trustee's Petition to Quiet Title to Funds in Trustee's Possession, filed April 5, 1950.

18. Petition for Review, filed April 14, 1950.

19. The following Exhibits:

(a) White's Exhibits 1 and 2.

(b) Trustee's Exhibit A for Identification.

(c) Trustee's Exhibits 1-15, except the following:

(1) Trustee's Exhibit 3 which is an excerpt from your Referee's Record of Proceedings in this bankruptcy case and which reads "5-19-48, petition to compromise re Gibbons granted."

(2) Trustee's Exhibit 15 which is the same instrument as Trustee's Exhibit 12.

20. Reporter's Transcript of Hearing on October 4, 1949, filed June 6, 1950.

21. Reporter's Transcript of Proceedings on January 27, 1950, filed January 31, 1950.

22. Reporter's Transcript of Proceedings on January 31, 1950, filed May 16, 1950.

Respectfully submitted this 22nd day of June, 1950.

/s/ BENNO M. BRINK,

Referee in Bankruptcy.

[Endorsed]: Filed June 22, 1950.

In the United States District Court, Southern  
District of California, Central Division  
In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

ORDER AFFIRMING REFEREE BRINK'S  
ORDER DATED APRIL 5, 1950, QUIETING  
TRUSTEE'S TITLE TO FUNDS IN HIS  
POSSESSION

The trustee in bankruptcy herein having filed a petition on August 20, 1949, requiring petitioner on review Joseph G. White to show cause why the trustee's title in and to the funds in his possession should not be quieted and requiring said petitioner on review to set forth his claim, if any, in or to said funds; and an order to show cause bearing said date having issued by the Honorable Benno M. Brink, Referee in Bankruptcy, directed to said petitioner on review; the petitioner on review having filed an "answer" herein on August 24, 1949, and thereafter an "amended answer" on December 18, 1949; and the trustee having filed a "reply" to said amended answer on January 25, 1950; and the proceeding having duly come on for hearing before the Honorable Benno M. Brink, Referee in Bankruptcy herein, on October 4, 1949, January 27, 1950, and January 31, 1950; Fred Horowitz and Alvin F. Howard, having appeared as attorneys for said petitioner on review, and Marvin Wellins and Daniel A.

Weber, having appeared as attorneys for the trustee in bankruptcy herein; after hearing the allegations and proofs of the parties, both oral and documentary, and being fully advised in the premises, the Referee having filed his findings of fact and conclusions of law on April 5, 1950, and having made an order on April 5, 1950, adjudging that petitioner on review had no interest in, and was not entitled to recover from the trustee, any of the funds in the trustee's possession, and quieting the trustee's title in and to the same, and said petitioner on review having filed on April 14, 1950, his petition for review by this Court of said order of the Referee made April 5, 1950; and the Referee's certificate of said proceedings, dated June 22, 1950, having been duly filed herein; and said petition for review having duly come on for hearing and argument before the Hon. Ben Harrison, Judge of this Court, on the 9th day of October, 1950; and Fred Horowitz and Alvin F. Howard, attorneys for said petitioner on review, by Alvin F. Howard, having appeared in support of said petition for review; and Marvin Wellins and Daniel A. Weber, attorneys for the trustee, having appeared in opposition thereto; and the parties having been duly heard; and after due deliberation the Court having made a minute order on November 13, 1950, affirming said order of the Referee dated April 5, 1950, and directing the trustee to present a formal order in respect thereto;

It Is Hereby Ordered, Adjudged and Decreed that the Referee's findings of fact and conclusions of law aforesaid, dated April 5, 1950, be and the same are

hereby adopted as the findings of fact and conclusions of law of this Court; and that said order of the Referee dated April 5, 1950, be and the same is hereby affirmed in all respects.

Dated: Dec. 4, 1950.

/s/ BEN HARRISON,

United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 4, 1950.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that Joseph G. White, respondent upon an order to show cause issued herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, dated and entered December 6, 1950, affirming the order of the Referee herein dated April 5, 1950, and adopting the Findings of Fact and Conclusions of Law of the Referee dated April 5, 1950.

Dated: January 2, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.  
White.

[Endorsed]: Filed January 2, 1951.



[Title of District Court and Cause.]

STATEMENT ON CASH DEPOSIT PURSUANT TO RULE 8(e) OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

The sum of Two Hundred Fifty (\$250.00) Dollars, in cash, is herewith deposited pursuant to Rule 8(c) of the local rules of the United States District Court, Southern District of California, Central Division, and Rule 73(c) of the Federal Rules of Civil Procedure. The fund deposited is owned by Joseph G. White, and said fund is hereby subjected to the aforesaid rules and is deposited in lieu of a bond and is conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed or of such costs as the Circuit Court of Appeals for the Ninth Circuit may award if the judgment is modified.

Dated: January 2, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.  
White.

[Endorsed]: Filed January 2, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant relies on two points only, the first point being that the decision of the United States District Court was contrary to law in its denial to appellant of the right of recoupment against the Trustee available to appellant on account of claims arising out of the transaction upon which the action entitled *George L. Gibbons v. Joseph G. White, et al.*, California State Superior Court action No. 533306, was based, and secondly, said decision was contrary to law in its failure to recognize that the compromise made by the Trustee with *George L. Gibbons* had the legal effect of extinguishing the promissory note which was the basis of the aforesaid action of *George L. Gibbons v. Joseph G. White*.

Dated: January 11, 1951.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Joseph G.  
White, Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE  
RECORD TO BE CONTAINED IN THE  
RECORD ON APPEAL

Appellant designates the following portions of the record to be incorporated in the record on appeal herein:

1. Trustee's petition requiring Joseph G. White to show cause why Trustee's title in certain funds in the sum of \$6220 should not be quieted, filed August 20, 1949;
2. Amended Answer of Joseph G. White, filed December 18, 1949;
3. Trustee's reply to Joseph G. White's amended answer, filed January 25, 1950;
4. Findings of Fact and Conclusions of Law of Referee, filed April 5, 1950;
5. Referee's order approving Trustee's petition to quiet title to funds in Trustee's possession, filed April 5, 1950;
6. Petition for Review filed April 14, 1950;
7. Order of the United States District Court entered December 6, 1950, affirming the aforesaid order of the Trustee;
8. Trustee's petition for compromise, filed May 3, 1948, being Trustee's Exhibit No. 1;

9. The Referee's order approving the aforesaid compromise, filed May 25, 1948, being Trustee's Exhibit No. 4.

Dated: January 11, 1951.

FRED HOROWITZ,  
ALVIN F. HOWARD,  
By /s/ ALVIN F. HOWARD,  
Attorneys for Joseph G.  
White, Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1951.

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[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL MATTERS AND PORTIONS TO BE CONTAINED IN THE RECORD ON APPEAL

Appellee hereby requests that the additional portions of the record hereinafter designated be incorporated in the record on appeal herein:

1. The order to show cause to quiet title to funds in possession of the trustee, filed August 20, 1949.
2. Reporter's transcript of hearing on October 4, 1949, filed June 6, 1950.
3. Reporter's transcript of proceedings on January 27, 1950, filed January 31, 1950.
4. Reporter's transcript of proceedings on January 31, 1950, filed May 16, 1950.

(By reason of the fact that all of said transcripts are now on file, no copies thereof are being submitted herewith.)

5. Notice to creditors and certificate of mailing thereof, filed May 6, 1948, which is trustee's exhibit 2.

6. Assignment executed by George L. Gibbons to the trustee in bankruptcy herein, dated June 19, 1948, which is trustee's exhibit 5.

7. Petition for leave to substitute Messrs. Wellins and Weber in the place of Jones & Wiener as attorneys for George L. Gibbons, filed June 16, 1948, which is trustee's exhibit 6.

8. Order authorizing substitution of Messrs. Wellins and Weber in place of Jones & Wiener as attorneys for George L. Gibbons, filed June 16, 1948, which is trustee's exhibit 7.

9. Receipt dated December 14, 1948, executed by Marvin Wellins and Daniel A. Weber, (by Marvin Wellins), which is trustee's exhibit 8 (and duplicated as trustee's exhibit 11).

10. The following papers in the action entitled "George L. Gibbons v. Joseph G. White" in the Superior Court of Los Angeles County, case No. 533,306: the complaint, answer; notice of motion and affidavits of George L. Gibbons, Donn B. Downen, Jr. and George M. Wiener, in support of plaintiff's motion for summary judgment, filed July 15, 1948; substitution of attorneys filed July 16, 1948; judgment after order granting plaintiff's motion for summary judgment, dated August 24, 1948; notice of entry of judgment, dated August 30, 1948, and filed

August 31, 1948; affidavit of service thereof by mail on Messrs. Horowitz and Howard on August 30, 1948; and satisfaction of judgment, dated December 13, 1948, entered on January 3, 1949. Said papers are a part of trustee's exhibit 9 (See pages 9-10, reporter's transcript of hearing on October 4, 1949).

11. The following papers in the action entitled "Francis F. Quittner, as trustee, etc., v. Joseph G. White," in the Superior Court of Los Angeles County, case No. 542,157: the complaint; answer, findings of fact and conclusions of law and judgment. Said papers are part of trustee's exhibit 10. (The complaint is duplicated as White's exhibit 2.)

12. The stipulation of George L. Gibbons withdrawing his claim in bankruptcy, which is trustee's exhibit 12.

13. The promissory note in the sum of \$5000.00 executed by Joseph G. White to George L. Gibbons, dated May 19, 1947, which is trustee's exhibit 15.

14. The promissory note executed by Al Herd to Joseph G. White in the amount of \$30,000.00, dated on or about May 19, 1947, which is trustee's exhibit . . for identification.

Dated: January 21, 1951.

MARVIN WELLINS, and  
DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,  
Attorneys for Francis F. Quittner as Trustee, etc.  
(Appellee).

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 22, 1951.



In the District Court of the United States for the  
Southern District of California, Central Division  
In Bankruptcy, No. 45,126-BH

In the Matter of

AL HERD,

Bankrupt.

Before the Honorable Benno M. Brink, Referee in  
Bankruptcy.

REPORTER'S TRANSCRIPT, HEARING ON  
ORDER TO SHOW CAUSE, TRUSTEE VS.  
JOSEPH G. WHITE, OCTOBER 4th, 1949

Appearances:

For Francis F. Quittner, Trustee of said Bank-  
rupt Estate:

MARVIN WELLINS, ESQ., and  
DANIEL A. WEBER, ESQ.

For Joseph G. White:

FRED HOROWITZ, ESQ., and  
ALVIN F. HOWARD, ESQ.

Tuesday, October 4, 1949. 2 P.M.

The Referee: We have the Order to Show Cause,  
Trustee against Joseph G. White, on our calendar  
for hearing at this time.

Mr. Wellins: Yes, your Honor.

Mr. Howard: That is correct.

Mr. Wellins: Out of consideration I would like, if we may, to read into the record here, or have marked the records that are here from the Superior Court.

The Referee: What are those?

Mr. Wellins: The Judgment Roll and the pleadings in the case of Quittner vs. White.

The Referee: I imagine there is not going to be much dispute about the facts here, and I think we should receive such evidence as you gentlemen desire to offer, and then I will submit it on briefs, because I want cases on the right of set-off in bankruptcy, and the first determining factor is going to be if the Trustee had substituted himself in the State Court action, could White have successfully asserted a setoff? I do not think we need to take time here to find out whether or not the bankrupt was indebted to White; although you gentlemen may have some views on it that maybe White was a partner of Herd, and so on. If we get that far, then, I shall restore the matter to the calendar and then find out whether there was any indebtedness from the [2\*] bankrupt to White. I think, perhaps, there is only one question of dispute as to the facts here up to this point as to whether there was any indebtedness by Herd to White, and I think that one question upon which there may be some dispute is as to what the Trustee acquired in his compromise with Gibbons. Can you point out what evidence we have on that, counsel?

Mr. Wellins: Yes, if your Honor please.

The Referee: What is it?

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Wellins: On May 25, 1948, as referred to on page 3 of our Affidavit here, an order was entered by your Honor confirming the Petition to Compromise, which reads in part as follows— (Interrupted.)

Mr. Horowitz: May we have the entire order read?

The Referee: Do you want to see it, Mr. Horowitz? Are you familiar with it?

Mr. Horowitz: No, I am not.

Mr. Wellins: I think it would be appropriate at this time for me to offer the original in evidence.

The Referee: Just a moment.

Mr. Horowitz: All right, your Honor.

The Referee: I suggest, gentlemen, that in order to have our record complete, that one or the other of you offer in evidence, first, the Petition to Compromise Trustee's Claim against George L. Gibbons, filed May 3, 1949. Do you want to do that? [3]

Mr. Wellins: Yes, we would like to do that.

The Referee: All right; Trustee's Exhibit No. 1 by reference—Petition to Compromise Trustee's Claim against George L. Gibbons.

Mr. Wellins: There is also an Exhibit A attached to that Petition—the settlement offer—which I would like to have included.

The Referee: Including Exhibit A thereof, filed May 3, 1948. Now, do you wish to offer the order?

Mr. Wellins: Yes, but, first, we would like to offer the Notice or the reference in the Court file, notice to the 134 creditors, dated May 6, 1948.

Mr. Horowitz: We object to it unless Mr. White was notified.

Mr. Wellins: We are not offering it for that purpose, but to show the legality of it.

The Referee: Is it stipulated that the offering of this Notice is not intended as proof that White received the Notice?

Mr. Wellins: Yes, your Honor.

The Referee: But merely as a procedure followed in connection with this Petition?

Mr. Wellins: Yes.

Mr. Horowitz: Yes, and we withdraw our objection to it.

The Referee: Then, Trustee's Exhibit No. 2 [4] by reference is the Certificate of Mailing and papers attached thereto, filed May 6, 1948. Now, do you want to offer the order?

Mr. Wellins: We next offer, by reference, the minute order of May 19, 1948, showing the Petition to Compromise the Trustee's Claim against George L. Gibbons, which came on for hearing and the petition was granted without opposition.

The Referee: Is that what it says?

Mr. Wellins: I don't know the exact language of it.

The Referee: Well, you have called it a minute order; it is not a minute order. We don't have anything like that. What is the date of it?

Mr. Wellins: May 19, 1948.

The Referee: What you wish to offer by reference is—and we will make it Trustee's Exhibit No. 3 by reference, Record of Proceedings dated May 19, 1948, reading: "Petition to Compromise re Gibbons granted."

Mr. Wellins: Next in order we offer, by reference, an Order entered on May 25, 1948, confirming said compromise.

The Referee: Trustee's Exhibit No. 4, by reference: "Order Approving Trustee's Petition to Compromise Trustee's Claim against George L. Gibbons, filed May 25, 1948." What else?

Mr. Wellins: We offer, next, Assignment of Proceeds to the Trustee, signed by George L. Gibbons, dated June 19, 1948. [5]

Mr. Howard: We have no objection to that.

The Referee: Trustee's Exhibit No. 5. What else?

Mr. Wellins: There is a document in the file of the Gibbons lawsuit, your Honor, relating to a substitution of attorneys, dated June 2, 1948.

The Referee: I do not have that.

Mr. Wellins: This might be an appropriate time to offer that, and for the purpose of the record it might be best to offer the entire file by reference.

The Referee: No, you can't offer anything by reference except what we have in our files here, and even then when you do that, if there is a review, you have to provide us with photostatic copies of each of these instruments received by reference.

Mr. Wellins: All right, your Honor, we offer by reference a document dated June 2, 1948, in the file of the case of George L. Gibbons against Joseph G. White, et al., in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 533,306 in the Superior Court of the State of California, in and for the County of Los



Angeles, entitled: "Substitution of Attorneys" and reading as follows—— (Interrupted.)

Mr. Howard: Why not supply the Court with a certified copy of it?

Mr. Wellins: All right. (Reading.) [6]

"Plaintiff George L. Gibbons hereby substitutes Marvin Wellins and Daniel A. Weber as his attorneys of record in the place and instead of Jones and Wiener, Esqs.

"Dated: January 2, 1948. Signed: George L. Gibbons."

Immediately following that on the same page:

"We consent to the above substitution.

"Jones & Wiener, by George M. Wiener."

Also, just below that, on the same page:

"Above substitution accepted.

"Marvin Wellins and Daniel A. Weber, by Daniel A. Weber."

The Referee: Filed when?

Mr. Wellins: Filed July 16, 1948.

The Referee: Do you want anything else out of that file?

Mr. Howard: Yes, we will want something else out of it.

The Referee: All right.

Mr. Wellins: Next, we offer a petition in this action of June 16, 1948, for an order authorizing Daniel A. Weber and myself to be substituted for Jones and Wiener as attorneys for Gibbons in his suit against White.

The Referee: June 16, 1948?

Mr. Wellins: Yes, your Honor.



The Referee: All right; Trustee's Exhibit 6 [7] by reference: Petition Authorizing Trustee's Attorneys to be Substituted in Pending Action, filed May 16, 1948. What else?

Mr. Wellins: Next in order, your Honor, we offer the record of proceedings of the Court in this matter on June 16, 1948, granting the petition.

The Referee: I don't think that means anything. There was no hearing in court on it. You have here a written order signed by the Referee, which is entitled: "Order Authorizing Trustee's Attorneys to Be Substituted in Pending Action," filed June 16, 1948.

Mr. Wellins: Yes, that is what I meant.

The Referee: Trustee's Exhibit No. 7 by reference: "Order Authorizing Trustee's Attorneys to Be Substituted in a Pending Action," filed June 16, 1948. What else?

Mr. Wellins: Affidavit of Publication by Mail contained in the Superior Court pleadings of the Gibbons case, referring to the mailing of the substitution of attorneys.

Mr. Howard: We stipulate to that.

Mr. Wellins: Do you stipulate that a copy of it was mailed to Cannon & Callister, attorneys for Joseph G. White, on July 13, 1948?

Mr. Horowitz: Yes, so stipulated.

The Referee: All right.

Mr. Wellins: We next offer the Complaint in the Gibbons matter, as well as the Answer, and the Judgment, and [8] ask leave to substitute copies

in place of the originals, which are in the Superior Court file.

The Referee: And what you had better do, then, is get photostatic copies of those instruments and have a stipulation here that as and when they are received here they may be marked exhibits next in order in this proceeding.

Mr. Howard: And there should be the affidavit upon which the Court granted the Summary Motion for Judgment.

The Referee: Well, let's find out what papers you want from that file.

Mr. Wellins: We want the Complaint, the Answer, the Notice of Motion, and Affidavits of George L. Gibbons, Donn B. Downen, Jr., and George M. Wiener in Support of Plaintiff's Motion for Summary Judgment, filed July 15, 1948; the Cross-Complaint on file by White against Gibbons——  
(Interrupted.)

Mr. Howard: There is no Cross-Complaint on file.

The Referee: How did you get a Summary Judgment without that?

Mr. Wellins: It is entitled: "Proposed Cross-Complaint," but actually it was not filed, and leave was denied to file it, and I don't know whether it should be put in for completeness of the record or not.

The Referee: Whatever you want. If it was not filed, what are you going to do?

Mr. Wellins: We will omit that at this time. [9]

The Referee: All right. Next?

Mr. Wellins: Next, the Judgment after Order Granting Plaintiff's Motion for Summary Judgment, dated August 24, 1948, entered on August 25, 1948, in Book 1954 at page 307, filed August 24, 1948, with the notation: "An Acknowledged Full Satisfaction of the Within Judgment was filed 12-17-48. Attest: W. G. Sharp, County Clerk, under date of 1-3-49, by C. Escapete, Deputy." Also, Notice of Entry of Judgment dated August 30, 1948, filed August 31, 1948; and with Affidavit of Service by Mail on Messrs. Fred Horowitz and Alvin F. Howard, on August 30, 1948; and, finally, Satisfaction of Judgment, dated December 13, 1948, filed on the same date and entered on January 3, 1949, in Book 1954, at page 37.

The Referee: All right, you may produce photostatic copies of all those instruments and they will be marked as Trustee's Exhibit next in order. Now, what else have you?

Mr. Wellins: Have you with you the original of the receipt for the payment of the money on the Gibbons judgment?

Mr. Horowitz: I believe we have—yes, we have it.

Mr. Wellins: May I have it?

Mr. Howard: Surely.

Mr. Wellins: We next offer in evidence the receipt dated December 14, 1948, for the money obtained in satisfaction of the Gibbons judgment.

The Referee: Trustee's Exhibit No. 8. [10]

Mr. Wellins: Will you stipulate that no appeal has been taken from the Gibbons judgment, and

that no proceedings have been instituted to set it aside on any grounds?

Mr. Horowitz: Excepting in so far as this proceeding here is had, yes.

Mr. Wellins: Yes.

Mr. Howard: And it has been paid.

Mr. Wellins: Yes.

The Referee: Anything else?

Mr. Wellins: Have you with you the file in the case of Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, Plaintiff, against Joseph G. White, et al., Defendants?

Mr. Howard: Yes.

Mr. Wellins: We ask for the same stipulation with regard to leave to have photostatic copies made and have them marked as exhibits here, in the Superior Court action of Quittner against White, being Case No. 542,157 of the Los Angeles County Superior Court.

Mr. Horowitz: All right.

Mr. Howard: Yes.

The Referee: All right.

Mr. Wellins: They are the Complaint——

Mr. Horowitz: There is no use building up a lot of costs against you or anybody else. This is your action against White. [11]

Mr. Wellins: The purpose is to show the applicability of Section 439 of the C.C.P., and if we can obtain from you at this time a stipulation we may be able to avoid a lot of trouble here.

Mr. Horowitz: All right; you may offer them.

Mr. Wellins: We offer the Judgment Roll in that case, your Honor.

The Referee: Very well. You are to get the photostatic copies and send them in here and we will mark those as the next exhibit in order. Anything else?

Mr. Wellins: That completes the documentary portion of the evidence.

The Referee: Does counsel have any further documents?

Mr. Horowitz: Nothing further. In connection with the action of Quittner against Gibbons there was a garnishment run on Mr. White as a defendant in the case of Quittner against Gibbons.

The Referee: I notice a file here from the Clerk's office; is that the file you refer to?

Mr. Horowitz: Yes, your Honor. We would like to offer in evidence the Return of Service of the Writ of Attachment, together with the Writ of Attachment in that particular action, and we will have photostatic copies made of them.

The Referee: They may come in and be marked as [12] White's Exhibits. Now, what else have you by way of documents?

Mr. Horowitz: In connection with the bankruptcy matter, the Petition for Allowance of Attorneys' Fees that is in your file, we would like to offer that as an exhibit.

The Referee: Have you any idea when that was filed?

Mr. Horowitz: Yes, January 7, 1949.

The Referee: Well, there are various petitions here. Here is a Petition for Allowance to Attorneys for Trustee, filed January 7, 1949.



Mr. Horowitz: That is it.

The Referee: All right; White's Exhibit No. 1 by reference: Petition for Allowance to Attorneys for Trustee, filed January 7, 1949. What else?

Mr. Horowitz: We have here a promissory note in the amount of \$30,000, executed by Al Herd in favor of Joe White, which was originally a part of the file in the Bankruptcy Court and was then used as an exhibit in the case of Quittner against White.

The Referee: Mr. Horowitz, are you offering that in support of your contention that Herd was indebted to White?

Mr. Horowitz: Yes, that is the only purpose of it.

The Referee: I suggest we leave that, because I am of the opinion that we might get into a lot of controversy over whether or not there was any indebtedness on the part of the bankrupt to White. I prefer to settle the legal [13] question first as to whether if the Trustee in Bankruptcy had substituted himself in the Gibbons action White could have pleaded any offset.

Mr. Horowitz: That is the meat of the coconut.

The Referee: Of course, there is this further situation: You contend the Gibbons suit was on a note upon which White was an accommodation maker. Now, that might, perhaps, have some inequities on the right of setoff, I don't know. However, I think we should allow both of those things to rest until we have decided the legal question, and when we have done that we will see how much further you gentlemen want to go into the case. Is there any further evidence as far as we are concerned now?



Mr. Wellins: No, your Honor.

Mr. Horowitz: No, your Honor.

The Referee: I am going to decide first, gentlemen, the right of offset, and from there you can, all of you gentlemen, offer any further evidence you may want to submit. However, counsel for the Trustee have filed some points and authorities here on this particular phase of the case to quiet title, and I suggest you gentlemen put in your points and authorities, and then counsel for the Trustee may have an opportunity to answer.

Mr. Horowitz: That is satisfactory to us.

The Referee: The matter is submitted on briefs, 10 and 5. [14]

### Certificate

I, E. B. Bowman, hereby certify that on the 4th day of October, 1949, I attended and reported, as official court reporter, the proceedings at the hearing on the Order to Show Cause, Trustee vs. Joseph G. White, in the above-entitled and numbered matter, before the Honorable Benno M. Brink, Referee in Bankruptcy, and that the foregoing is a true and correct transcript of the proceedings had therein (exclusive of the argument) on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof (exclusive of the argument of counsel for the respective parties).

Dated at Los Angeles, California, this the 5th day of June, 1950.

.....

Official Court Reporter.

[Endorsed]: Filed June 6, 1950.

Friday, January 27th, 1950. 10:00 A.M.

The Referee: Al Herd. Everybody ready in this case?

Mr. Weber: Ready, your Honor.

Mr. Horowitz: Yes, your Honor.

The Referee: We are proceeding here this morning upon a petition to quiet title to funds in the possession of the Trustee, filed by the Trustee on August 20, 1949, upon which on the same day an order to show cause was issued requiring Joseph G. White to appear and show cause, setting forth his claim, if any, in or to certain funds or proceeds in the possession of the Trustee.

To that petition and in response to that order to show cause an answer was filed by Mr. White on August 24, 1949.

The matter thereafter came on for hearing on what day? I would like to get this record complete here. I think it was originally set for the 6th of September, 1949, and was thereafter continued to October 4, 1949, if my dates are correct, at which time it was partially heard and the Court took under submission the general question as to whether or not the respondent White could assert certain claims to offset. Thereafter on December 19, 1949, Mr. White filed an Amended Answer in the proceeding and as I understand it, for the purposes of the case now, that Amended Answer supersedes in its entirety the original answer filed. Is that [2] correct, Mr. Howard?

Mr. Howard: That is correct, if the Court please.

The Referee: In other words, the Amended Answer contains all of the defenses and claims of Mr. White?

Mr. Howard: That is correct, if the Court please.

The Referee: On January 25, 1950, the Trustee filed his Reply to the Amended Answer. Now, the papers that I have mentioned are the pleadings in this case. Is that correct, gentlemen?

Mr. Howard: Yes, if the Court please. In addition, there are some briefs which have been filed.

The Referee: I understand that, but I mean the actual pleadings in the law suit.

Mr. Howard: Yes.

The Referee: All right. This is off the record, Mr. Singeltary.

(Discussion off the record.)

The Referee: I think, gentlemen, that we should first take up the separate and distinct defenses which are alleged in the Trustee's Reply and see whether or not we can shorten this proceeding any.

Mr. Howard: If the Court please, may I make a formal motion? In the Complaint, or rather in the Amended Answer, there is a typographical error. In Paragraph V, the second line of that paragraph, it stated that Mr. White executed the note as an accommodation for Mr. Gibbons. That should have been [3] as an accommodation for Mr. Herd. This has been called to the attention of the attorneys for the Trustee and they had answered as though the word "Herd" were in there. They denied it was an accommodation for Herd or Gibbons because we had called this to their attention.

Mr. Weber: We recognize that to be an inadvertence.

The Referee: All right, you wish to amend by interlineation?

Mr Howard: We wish to amend by interlineation, to cross out the word "Gibbons" and insert instead the word "Herd."

The Referee: Very well. The Court by interlineation on line 5 of page 3 of the Amended Answer filed December 19, 1949, now strikes out the word "Gibbons" and inserts in lieu thereof the word "Herd."

Mr. Wellins: Your Honor, at 11 o'clock I have a hearing on a motion in Department 35 and in order to obtain a continuance in that matter I have been requested to ask permission to come over there for a few minutes if it is convenient for you to take your morning recess at that time, and then return to this Court.

The Referee: I assume there is no objection?

Mr. Howard: No, of course not.

The Referee: All right, will you tell me what time you want to leave here?

Mr. Wellins: Well, just a minute or two before 11. [4]

The Referee: All right, we will take the recess, if you will remind me of it if I overlook it, at 5 minutes to 11.

All right, now we are back to the separate and distinct defenses set forth in the Trustee's Reply to the Amended Answer.

I assume that it may be stipulated that the allega-

tions of Paragraph I of the first separate and distinct defense are true?

Mr. Howard: The positive allegations, if the Court please.

The Referee: Well, why not all of the allegations of Paragraph I?

Mr. Howard: Well, this is of the Trustee's Reply?

The Referee: Yes.

Mr. Howard: Well, if the Court please, in that Reply they deny certain allegations which were——

Mr. Wellins: No, the first affirmative defense.

Mr. Howard: Oh, the first affirmative defense. I'm sorry.

The Referee: Yes, the first separate defense, just Paragraph I is all I'm talking about.

Mr. Howard: Oh, yes, of course, if the Court please.

The Referee: That is true?

Mr. Howard: Yes.

The Referee: And Paragraph II, will that be stipulated? [5]

Mr. Howard: Yes.

The Referee: Now, Paragraph III I imagine is more or less of a conclusion, more a conclusion than an allegation of fact. It alleges: "Among the issues necessarily determined in said action were the issues of the plaintiff's (Gibbons) title in and to said promissory note, his right to maintain said action, and his right to recover judgment upon said promissory note."

Mr. Howard: If the Court please, this is a con-



clusion as to what was determined in that action. In addition, we are of the opinion or take the position that this was not relevant to the question presented in this case, which is not whether or not that Court was right in its conclusions but whether or not that judgment should stand by reason of the facts concerning the circumstances under which it was secured. We are not here attacking the judgment of the state court in that action. We are seeking to set the judgment aside, and its effect aside, because as we claim it was secured by fraud.

The Referee: Yes. All right. Now let's take the balance of this first defense. Paragraph IV: "By said judgment said issues were adjudicated and determined in favor of the plaintiff."

Well, that is another conclusion.

Paragraph V: "No appeal has ever been taken from said judgment, and the same became and was at all times until the [6] same was paid, satisfied and discharged by respondent White on December 17, 1948, a final, valid and subsisting judgment."

Well, that is true.

Mr. Howard: There is no doubt about that.

The Referee: Sixth: "By reason of the foregoing, the issues raised and tendered by respondent White in respect to the funds in the possession of the Trustee herein, and the matters and transactions alleged in the amended answer, are *res judicata*, and respondent White is concluded thereby; and respondent White is estopped and precluded from relitigating any of said issues or matters, or from asserting any claim, counterclaim or offset in re-



spect thereto, or to said funds, or the cause of action underlying said judgment.”

Mr. Howard: If the Court please, not only is that conclusion, we contend it is an erroneous conclusion.

The Referee: Well, unless counsel for the Trustee have something further to offer than has already been considered by the Court, I shall rule against them on their first separate defense, namely, their contention therein made that the judgment referred to in the state court in the Gibbons suit is *res judicata* here because I have already indicated that it is my conclusion that under all the circumstances of this transaction the respondent White, unless he is otherwise foreclosed by any other defense which you raise here, has a right to be heard on the matters that he is alleging here.

Mr. Wellins: We do have something further to add to that. [7]

The Referee: What is that?

Mr. Wellins: This particular defense, in the first place, is related to other defenses and related to the whole case, and it is rather difficult to isolate from the others.

In the first place, whether or not this Court has the jurisdiction to determine that question must be ascertained. In the second place, whether or not the facts admitted by the respondent White amount in themselves as a matter of law to a bar precluding him from asserting any such claim as he now makes must be ascertained; and in support of that there is before the Court a photostatic copy of various case

records that have preceded this showing the knowledge on the part of Mr. White of several factors which completely bar him and which substantiate the point of view of the Trustee that the state court judgment is *res judicata*. In other words, even going a step beyond the general premise of this defense of *res judicata* here, you have Mr. White's knowledge of the garnishment made by the Trustee many months before the state court action on the promissory note was determined, wherein Mr. White knew from the records before your Honor in evidence here that the Trustee in Bankruptcy had filed a garnishment for a certain amount of money based upon a claim that the Trustee had in a pending lawsuit mentioned in that garnishment, whereby the Trustee sought to recover damages and penalties from Mr. Gibbons for alleged usurious interest charged to the bankrupt for loans and for various other relief that [8] the Trustee was seeking.

The Referee: Well, let me see if I understand you now. Do you say that there is in evidence here in this matter now that I'm hearing now, not in the general bankruptcy case of Al Herd, an instrument showing that in action No. 533,306 in the Superior Court, being the case of Gibbons vs. White, the Trustee caused a garnishment to issue against Mr. White?

Mr. Wellins: Yes, your Honor. I think the date is the 20——

The Referee: Which exhibit is it?

Mr. Wellins: The garnishment was issued in the Federal Court action and served on Mr. White with

respect to the proceeds of the recovery in this state court action whose number your Honor just gave, and that was done on December 29, 1947.

The Referee: Do you know what exhibit that is?

Mr. Wellins: Well, yes, the exhibit we put in at the last hearing in this matter in this Court.

Mr. Howard: I can give the Court the number of that exhibit, I believe.

Mr. Weber: I wonder if I could clarify something.

Mr. Wellins: We said that we would furnish the photostats subsequent to the exhibit—I mean subsequent to the hearing, and they were subsequently furnished to the Court.

Mr. Howard: I think the original is in the court, the [9] original return on the garnishment. We have asked the Court's clerk to bring up file No. 7870-Y, and I believe the last paper in that file is the United States Marshal's return on the garnishment that was made on Mr. White.

Mr. Weber: I think the file in the Federal action, Quittner vs. Gibbons, No. 7870-Y, shows from the Marshal's return that the service of the garnishment issued out of that action was made on April 13, 1948. That appears in File 7870-Y.

The Referee: What is the date of that?

Mr. Weber: April 13, 1948, is the date on which the garnishment which was issued out of the action of Quittner vs. Gibbons in the Federal Court was served on the respondent White in this case.

Mr. Howard: I don't remember the date but there is no doubt it was served on Mr. White before

the termination and payment of the Gibbons judgment.

The Referee: I don't find it, gentlemen.

Mr. Weber: May I assist the Court? I think this is the return to which I have reference, your Honor (indicating).

The Referee: Well, you are calling attention to a paper filed April 21, 1948, in proceeding No. 7870-Y in the United States District Court for the Southern District of California, Central Division, in which Francis F. Quittner was plaintiff and George L. Gibbons defendant, and that paper is returned by the United States Marshal stating that he served the [10] annexed attachment on the therein named Joseph G. White on the 13th day of April, 1948.

Now, the next attachment is a Writ of Attachment issued by the Clerk on the 5th day of April, 1948, and it is just an ordinary Writ of Attachment. I don't think it mentions Mr. White.

Now, you say there is a return?

Mr. Howard: That is the return that I was referring to in the file.

The Referee: Oh, that is the return. I thought you meant a return by the garnishee.

Mr. Howard: No, if the Court please, that is the return I was referring to.

The Referee: Have you anything further to offer?

Mr. Wellins: As I understand it, your Honor, this file is in evidence by reference as a result of our last hearing on this matter several months ago,

including the attachment and the return on it.

The Referee: Yes.

Mr. Wellins: And I have to—in order to make our position clear before the Court, I shall have to briefly review a few of these salient facts.

The Referee: I don't want any argument, Mr. Wellins.

Mr. Wellins: No, I'm not going to devote it to any argument, but you asked whether the Trustee had anything to offer. [11]

The Referee: Any further evidence, yes.

Mr. Wellins: The information before the Court will have to be related with regard to *res judicata* and to many issues. The first is whether or not the parties and issues were so identical for the general principles of *res judicata* to be applicable; and the second is whether or not there is any evidence of fraud based upon the documents which are now before the Court in evidence, and their legal significance; and the third question is if the parties and issues are identical is there any reason why this Court should assume jurisdiction to set aside or vacate the effect of that particular Superior Court judgment.

Now I would like to address myself to the first of those propositions.

The Referee: No, you want to argue the case. I don't want any argument. I have gone over all that. I simply want to know if you have any further evidence.

Mr. Wellins: Yes, there is a tremendous amount of further evidence.



Mr. Weber: May I address the Court?

The Referee: If you have any further evidence.

Mr. Weber: We would like to inquire on this point: Are you ruling the matter is not *res judicata* on the ground of fraud——

The Referee: I'm sorry, sir. I am simply ruling your first defense is not well taken. [12]

Mr. Weber: In order to answer the Court's question whether we have evidence, we certainly have evidence on the question of fraud.

The Referee: All right, produce it.

Mr. Wellins: All right, we are going to call the attention of the Court to several factors, in addition to that garnishment of which I spoke, by way of additional evidence.

The Referee: I want you to present your evidence.

Mr. Wellins: It is already in evidence. It has to be pointed out to the Court.

The Referee: No, it doesn't. I don't want any argument. Have you any further evidence on that first separate and distinct defense?

Mr. Wellins: Well, I feel that the only way we can present our evidence is by referring to it, Your Honor.

The Referee: Yes, but I don't want any argument at this time. I don't want any summary of the evidence. I want to know if you have any further evidence to offer.

All right, I hold that the first separate and distinct defense is not well taken for the reason the Court finds that at the time of the judgment and the trial



in the case of Gibbons vs. White, case No. 533,306, the Trustee in Bankruptcy was the real party plaintiff in the case and that the defendant in the case at the time of the judgment had no knowledge of the fact that the Trusee was the real——

Mr. Weber: Oh, wait. [13]

The Referee: Gentlemen——

Mr. Wellins: We haven't said we had no evidence. You are deciding the case before we put on the evidence.

The Referee: I called for evidence. You just stand up and talk.

Mr. Wellins: We haven't yet put on our evidence.

The Referee: Counsel, I'm sorry, sir, but I am going to go forward with this case. You can only present evidence by calling a witness or offering documentary evidence. Do one or the other.

I am taking the adjournment you requested and when we reconvene that is what you will have to do.

Mr. Wellins: I would like to ask one question.

The Referee: Yes.

Mr. Wellins: From what Your Honor has stated —Your Honor has stated from the bench and have decided facts about whether or not Mr. White had knowledge. How has that been determined?

The Referee: Call me, Mr. Singeltary, when they are ready.

(Recess.)

The Referee: All right, any further evidence on the first defense?

Mr. Wellins: Your Honor, there is one further

document as part of the documentary evidence, and that is the receipt that Mr. White received from me when he paid the judgment. [14]

The Referee: Is that in evidence?

Mr. Wellins: No, it is not. I think Mr. White probably has that.

Mr. Howard: We looked through our file for that but apparently it has been misplaced. If you have a copy of that I will recognize it and we will permit the copy to be introduced. I am familiar with the terms of the receipt.

Mr. Wellins: I believe we have a copy, Your Honor, if we are able to find it.

Your Honor, I offer in evidence a carbon copy of a receipt dated December 14, 1948, and undertake to the Court that this is the same in language as the original.

The Referee: No objection to the copy?

Mr. Howard: No objection to the fact it is a copy. If the Court please, we searched our records for that and we are unable to find it. If the original should show up we would like to ask permission of the Court at that time to replace the copy with the original.

Mr. Wellins: Yes; we have no objection.

The Referee: All right. Does either side wish to offer any evidence in connection with the execution or delivery of this receipt?

Mr. Howard: Yes, if the Court please.

The Referee: Do you have any evidence you want to put on?

Mr. Wellins: May I complete what I was start-

ing to say [15] a moment ago? On the subject of documents we have, there is one other document I was about to mention, Your Honor.

The Referee: Yes.

Mr. Wellins: There is a withdrawal of the claim, a stipulation regarding the withdrawal of the claim of George L. Gibbons in this bankruptcy file, and we offer that as the Trustee's exhibit next in order by reference.

The Referee: Well, where is it?

Mr. Wellins: It is in the file which I imagine is before Your Honor.

The Referee: I know, but I have a file here which is very thick.

Mr. Wellins: While Mr. Weber is looking for that, to save time may I state the position of the Trustee——

The Referee: No, you may not. Do you have any evidence you wish to offer in connection with—go ahead with your evidence, counsel.

Mr. Wellins: On the subject of further evidence, the Trustee takes the position that the burden of producing any evidence on the subject beyond what is already in evidence is on the respondent White.

The Referee: Counsel, now let's all get along here. I have a difficult matter here. It is going to take a considerable time at best, and let's please go along as the Court requests. You have no further evidence. All right, do you wish to offer any evidence, counsel? [16]

Mr. Wellins: There is one thing I wish to make clear in the record. If they produce any evidence to

show that they had no knowledge of what was going on in regard to the claims of the Trustee's counsel in this case, then we will produce evidence, but at this time we offer no evidence on the subject of notice; but on the question of *res judicata*——

The Referee: I'm sorry, sir. That is plenty. Please be seated. Proceed, counsel.

Mr. Weber: Here is that stipulation the Trustee would like to offer as the next exhibit in evidence.

The Referee: All right, let's get these exhibits marked. Is there any objection to the receipt in evidence of the receipt for the money?

Mr. Howard: No, if the Court please.

The Referee: All right, that is 'Trustee's Exhibit 11.

Now, there is offered a stipulation withdrawing the claim of George L. Gibbons filed in this bankruptcy proceeding on July 14, 1948. Is there objection?

Mr. Howard: I wonder if I may have an opportunity to examine it?

The Referee: Yes, surely.

Mr. Howard: I don't know that it is relevant but I have no objection to its going into evidence, if the Court please.

The Referee: All right, Trustee's Exhibit 12 by reference, stipulation withdrawing claim of George L. Gibbons, [17] filed July 14, 1948.

Of course, it must be understood, gentlemen, that anyone who offers an exhibit by reference, if it is necessary to make up the Referee's record the person offering that exhibit must supply the Court

with a photostat thereof. Of course, if there is no record made of it then it isn't necessary.

All right, proceed, sir.

Mr. Howard: If the Court please, I would like to have myself sworn as a witness to testify with reference to the circumstances under which the receipt was given.

The Referee: All right, raise your hand and be sworn.

### ALVIN F. HOWARD

called as a witness, being first duly sworn, testified as follows:

The Referee: Will you state your name in the record?

The Witness: Alvin F. Howard.

The Referee: All right, you may proceed, sir.

### Direct Examination

By Mr. Horowitz:

Q. Mr. Howard, you are associated with me, that is Fred Horowitz, in the practice of law?

A. Yes.

Q. And in connection with the settlement of the judgment in the action of Gibbons vs. White, did you personally [18] handle that matter?

A. Yes, I did.

Q. Calling your attention to Plaintiff's Exhibit No. 11, which is dated—or Trustee's Exhibit No. 11, which is dated December 14, 1948, I will ask you whether before the original of that receipt was



(Testimony of Alvin F. Howard.)

given you had a conversation with Mr. Wellins, one of the attorneys for the Trustee?

A. Yes, I did.

Q. Where did that conversation take place?

A. In Mr. Wellin's office.

Q. And that is located where?

A. I don't recall where it was at that time. It is in a downtown office building. I don't recall the address.

Q. Who was present at that time?

A. Mr. Wellins, Mr. and Mrs. White and myself.

Q. Will you relate the conversation that was had at that time and place?

Mr. Wellins: If the Court please, we object to that. The receipt is in evidence. The receipt is signed. The receipt has been accepted. There has been nothing done by them towards repudiating the receipt. No party is permitted——

The Referee: Please don't argue, counsel. State your legal objection.

Mr. Wellins: Any conversation would be incompetent, irrelevant and immaterial. The receipt is and purports to be [19] a complete document and speaks for itself.

The Referee: Overruled.

A. Mr. and Mrs. White had arranged to provide the funds to pay off this judgment that had been secured in the Gibbons case, and I called Mr. Wellins and told him that we had made arrangements to make the payment, and we wanted the proceeding which had been started to sell Mr. White's home



(Testimony of Alvin F. Howard.)

stopped, and he said to come into the office with the money and he would stop the execution sale. Mr. and Mrs. White and I walked over to his office, and had the money there, and there was some question about the amount of costs and we agreed as to the amount of costs; and I said to Mr. Wellins, "How can we pay you this sum when you as attorney for the Trustee have a garnishment against us"; and Mr. Wellins said, "I will sign the receipt both as attorney for Mr. Gibbons and as attorney for the Trustee so that you may be assured that in making the payment to Mr. Gibbons you will not incur any danger of a duplicate payment to the Trustee." Whereupon Mr. Wellins dictated this instrument, Trustee's Exhibit 11, and handed it to me and I read it over, and since it protected us both on the judgment of Gibbons and in the payment of money which in my opinion at that time we were subject to a garnishment on——

Mr. Wellins: I move to strike the words "in my opinion."

The Referee: Motion granted.

The Witness: And since the receipt was signed by him [20] as attorney both for Mr. Gibbons and for Mr. Quittner, we executed it—or we accepted it, rather.

Mr. Horowitz: No further questions.

The Referee: Cross-examine.

(Testimony of Alvin F. Howard.)

Cross-Examination

By Mr. Wellins:

Q. Mr. Howard, the writ of attachment that you mentioned is this writ of attachment in the case of Francis F. Quittner as Trustee in Bankruptcy of Al Herd, Bankrupt, vs. Gibbons, No. 7870-Y in the District Court of the United States for the Southern District of California, Central Division; is that right?

A. Yes. I thought of it as a garnishment on Mr. White——

Mr. Weber: We object to that——

The Witness: I don't know whether that is the one or not. I was referring to it as the garnishment in this case, No. 7870-Y.

Mr. Wellins: I will move to strike the answer as not responsive.

The Referee: Motion granted.

The Witness: The attachment I was referring to was the one which was served, where the return was made in this exhibit which is in the file, by the United States Marshal.

The Referee: I'm sorry. Let me get this clear. I [21] don't object to two counsel participating in the case, but when one counsel is on his feet the other counsel will have to remain seated.

Q. (By Mr. Wellins): Well, now, in order to clear this up in my own mind, Mr. Howard, I show you the return of service on the writ of attachment in the Federal file just mentioned. A. Yes.

(Testimony of Alvin F. Howard.)

Q. Attached to the writ of attachment which I just showed you?      A. Yes.

Q. And which is marked Exhibit No.—

The Referee: Which one?

Mr. Wellins: The attachment, Your Honor.

The Referee: It has not been marked as any exhibit. I think you said that the whole file was in evidence, but I don't know whether it is or not.

Mr. Wellins: I don't know whether it is, either, Your Honor.

The Referee: I doubt it very much. Wait a minute.

The Witness: Well, the answer is yes.

Mr. Wellins: Is the file in evidence, Your Honor?

The Referee: I doubt it. I don't see any reference to it.

Mr. Wellins: I see. Well, Your Honor, at this time I offer in evidence the writ of attachment of which I spoke. [22] I believe that counsel has a copy of it and it might be convenient for the Court if the copy—if we offered that copy in evidence.

Mr. Horowitz: This is the document, if Your Honor please, that was served upon Mr. White. It is a writ of attachment and garnishment. I have no objection to its being used.

The Referee: Trustee's Exhibit 13.

Mr. Wellins: Is there any letter attached to it which is not a part of it, Mr. Horowitz?

Mr. Horowitz: No, the letter is from the United States Marshal. That is the garnishment in connec-

(Testimony of Alvin F. Howard.)

tion with the writ of attachment.

The Referee: Very well.

Q. (By Mr. Wellins): And you say that Mrs. White was there on that occasion, Mr. Howard?

A. Yes.

Q. And the amount of this receipt, which is Trustee's Exhibit 11, was for checks totalling \$6220.00; is that correct?

A. I think that is correct. It would be on here. Yes, that is correct.

Mr. Wellins: If the Court please, we offer by reference the complaint in this case No. 7870-Y, Quittner vs. Gibbons, in the District Court of the United States in this District as the Trustee's Exhibit next in order. [23]

The Referee: Let me have it.

Mr. Horowitz: I think it is material. I don't like to make any objection at all. I really would like to have all of the evidence that the other side thinks is pertinent in. I will not make any objection.

The Referee: All right. However, may I caution you gentlemen that in such a situation as this one may well anticipate a review and perhaps an appeal, whichever way the Referee may decide it, and I caution you all against making your record too voluminous. I have a complaint here with a number of exhibits, all of which will have to be photostated and will have to be included in the record if it goes up. Now, I don't know why the estate should go to the expense of photostating this 23-page complaint with the exhibits thereto attached.

(Testimony of Alvin F. Howard.)

Mr. Wellins: We will withdraw the offer, Your Honor.

The Referee: All right.

Mr. Wellins: May I see the last exhibit, Your Honor?

The Referee: 13?

Mr. Wellins: Yes.

The Referee: All right (handing document to counsel).

Q. (By Mr. Wellins): Mr. Howard, I show you Exhibit 13 and ask you to state the date when this exhibit came into your possession.

A. I can't tell you that.

Q. Is it true that you became Mr. Gibbons' attorney—— [24]

Mr. Horowitz: You don't mean Gibbons.

Mr. Wellins: I'm sorry.

Q. Is it true you became the attorney for Mr. Joseph G. White on or about July 1st, 1948?

A. Well, it was shortly before the hearing on your motion for summary judgment which was—if you could give me that date I could fix the time.

Q. Our records indicate that the motion for summary judgment in the promissory note action was filed July 15, 1948.

A. Then I would say it was about July 1st that we represented Mr. White.

Q. I see. And would you say that on or about the date that you became counsel for Mr. White you received among other things this document or group of documents marked Trustee's Exhibit 13?



(Testimony of Alvin F. Howard.)

A. I can't tell you when we received it, counsel. Mr. Horowitz shows me a substitution of attorneys dated August 4th whereby we were substituted——

Q. That is 1948?

A. 1948—whereby we were substituted for Reed Callister who previously represented Mr. White in the Gibbons action, that is the state court action No. 533306. I do know that this writ of attachment—or it is the best of my recollection that we got it from Reed Callister and not from Mr. White, so Mr. White, I conclude from that, must have received [25] it before we represented him.

Q. I see; and you received it from Mr. Reed Callister, and can you fix the date?

A. No, I can't.

Q. Some time, in any event, prior to August 4, 1948; is that right?

A. I don't know whether we got it later or earlier. There were several cases in which Mr. Callister represented Mr. White, and from time to time we went over there and asked him if he had any files or information on this and he would get it for us if he had it, and I don't recall. This probably came into our office without my knowledge, and the first time I saw this was this last two weeks although it was in our office, I assume, for a considerable period before that. You will notice it wasn't filed. It wasn't in our file. I knew of the attachment but I hadn't seen that particular paper.

Q. I see. Is it true that you knew of the attachment and of the name of the action in which the



(Testimony of Alvin F. Howard.)

attachment was drawn at or about the time that you became the attorney for Joseph White in about July of 1948?

A. I think it was about then some time.

Q. Prior to the date of the receipt, that is prior to December 14, 1948, is it true that you attended various hearings of 21-A examinations of the respondent Joseph White in this Court in which Mr. Weber and myself appeared as attorneys [26] for the Trustee?

A. It is not true. I never attended such a hearing.

Q. Is it true that you knew that Mr. White had been examined by Mr. Weber and myself as attorneys for the Trustee prior to December 14, 1948?

A. I knew that he had been examined in such a proceeding because I had seen transcripts of that in Mr. Horowitz' office. I didn't examine them but I asked him, "What are these," and he said, "These are transcripts in the bankruptcy proceeding where Joe White gave testimony up there."

Q. And is it true that Mr. Weber and I as attorneys for the Trustee gave you and Mr. Horowitz our carbon copy of the 21-A testimony, including that of Mr. White,, some time in or about the month of July, 1948?

A. Yes. I understood that you had let us use your copies of the 21-A testimony of Mr. White; and so I will make it clear, I state that I knew you and Mr. Weber represented the Trustee in Bankruptcy.

(Testimony of Alvin F. Howard.)

Q. And when did you know that?

A. Oh, I don't know when I first acquired that information.

Q. It is also true, is it not, that you knew that information prior to December 14, 1948? You had that information prior to December 14, 1948?

A. At the time—that is the time we paid off on the Gibbons judgment? [27]

Q. Yes.

A. I knew that you represented the Trustee in Bankruptcy at that time, and I knew it somewhat prior to that time.

Q. When did you first learn it? What was the occasion?

A. I don't know when I first learned it, nor do I know or recall the occasion of it, but I assume it was in connection with our representation of Mr. White. That would be the only way I could know.

Q. It was before the motion for summary judgment was made in the promissory note action that you learned that; is that true?

A. I think it was, although I'm not certain. It now comes to me how I knew it. I was familiar with the fact that Mr. White was being sued by the Trustee in the partnership action and that you were the attorneys for the plaintiff in that case. That is how I found out.

Q. So we have some idea of dates on this thing, Mr. Howard, I show you a copy of a letter written by Mr. Weber to Mr. Horowitz, with whom you are associated, on April 29, 1948, in connection with

(Testimony of Alvin F. Howard.)

those volumes of the transcript of the 21-A examination in the Herd bankruptcy which were loaned to you and which were examined by you, and call to your attention that you knew at that time that Mr. Weber and I were the attorneys for the Trustee in Bankruptcy here.

A. If you are asking for my personal knowledge, I can't say that I knew because of this letter because Mr. Horowitz [28] handled the Quittner vs. White case and I knew it was in the office and I knew generally the nature of the action and who the attorneys and parties were, but I didn't necessarily see all the correspondence.

Q. No, I didn't ask you whether you saw this letter. I merely show you the letter to call your attention to the date when you knew we were attorneys for the Trustee.

A. I don't think I necessarily knew it at that time.

Q. I also show you another letter dated May 12, 1948, addressed to Mr. Horowitz, enclosing additional volumes of the transcript for your office to examine, and I will ask you whether you knew on May 12th that Mr. Weber and I were the attorneys for the Trustee in this matter?

A. I may have known or I may not have known. I can't tell you when I first acquired that information. As I said, I found it out in connection with my knowing of the Quittner vs. White partnership case.

Mr. Horowitz: If it would be of any assistance,

(Testimony of Alvin F. Howard.)

I would be quite willing to stipulate, if your Honor please, that I knew that Messrs. Wellins and Weber were attorneys for Mr. Quittner as Trustee for the Estate of Al Herd during the month of March, 1948, if that will be of any consequence. That happens to be the fact.

The Referee: Very well.

Mr. Wellins: Thank you. We accept the stipulation.

The Referee: All right; go ahead. [29]

Q. (By Mr. Wellins): Now, did you know in or about July of 1948, that the law firm of Jones & Wiener was the counsel for George L. Gibbons in the promissory note action?

A. I can't tell you the exact date but perhaps it will be helpful if I tell you this: My recollection is that Joseph White was represented by Cannon & Callister in the Gibbons action and that the motion for summary judgment was filed before we were substituted in and became familiar with that action. We were representing Mr. White in the Quittner vs. White case, which is the partnership case. Then later we heard of the Gibbons action against Mr. White, or I did, I heard of the Gibbons against White, and Mr. Horowitz was handling the partnership case and turned over to me the defense of the summary judgment motion in the Gibbons case, and——

Q. Excuse me just a moment. I wanted to find out about your knowledge of Jones & Wiener.

A. That is what I'm coming to; and when I received the file in the Gibbons case, that is when I

(Testimony of Alvin F. Howard.)

found out that Jones & Wiener, by looking at the file, were the original attorneys for Mr. Gibbons and that they had been substituted out, and I am assuming that was in our file we received from Reed Callister, and that you had been substituted in as attorneys for Mr. Gibbons.

Q. You mean by that, Marvin Wellins and Daniel A. Weber?

A. Yes. Whether I received that file on July 10th or [30] later I can't tell you, but it was some time along in there.

Q. Very well. That was in the year 1948?

A. Yes.

Q. And did you also know in the month of July, 1948, that Mr. Weber had his offices in Beverly Hills and that I had my offices downtown in the Subway Terminal Building at 417 South Hill Street?

A. Oh, I don't know whether I knew it or not. It must have been on your pleadings but I can't say I knew where your offices were until such time as you moved into the building where we are now located.

Q. As a matter of fact, you knew where my office was when you came up to my office on December 14, 1948, in connection with the receipt in evidence?

A. Yes. That is the first time I found out where your office was actually.

Q. You knew that Mr. Weber and I were not engaged in the general practice of law together or



(Testimony of Alvin F. Howard.)

sharing offices together but were merely working as co-counsel for the Trustee in this matter?

Mr. Horowitz: We will object to that as immaterial.

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Did you in the month of July, 1948, attend a meeting in your office with Mr. Weber and Mr. Horowitz in relation to the promissory note action and other actions then pending between the Trustee and Joseph G. White? [31]

A. I attended a conference in Mr. Horowitz' office at which Mr. Horowitz, myself, and my recollection is both you and Mr. Weber, were present, yes. What month it was I don't recall. I think it was prior to the hearing on the motion for summary judgment in the Gibbons action.

Q. That is correct. Are you sure that I was there, Mr. Howard?

A. No, I'm not, but I have that recollection. I'm not positive. I think both of you were there.

Q. As a matter of fact, isn't it correct that just Mr. Weber was there and not myself?

A. It is possible. My recollection of the meeting is that both of you were there. I might well be wrong.

Q. All right, during that meeting about July, 1948, is it true that there was discussion among Mr. Horowitz, yourself, and Mr. Weber about the settlement of three lawsuits, namely, the lawsuit in which the Trustee was suing Mr. White for unlawful eviction, the lawsuit in which the Trustee was suing



(Testimony of Alvin F. Howard.)

him for a partnership accounting, and the promissory note action?

A. There was a discussion of each of those actions as I recall.

Q. And there was also a discussion of how much money would be acceptable to the Trustee in full settlement of those three actions; is that correct?

A. Well, it all depends on what you mean by "discussion." [32] We made an offer and Mr. Weber turned on his heel and walked out.

Q. I am not implying that there was an acceptance of the offer, but you made an offer of a lump sum of money for the settlement of those three suits; is that correct?

A. Well, that is not quite correct. Do you want me to tell you what my recollection is of the conversation?

Q. Well, I want you to tell me whether or not it is true that there was a discussion among the——

Mr. Horowitz: Just a moment. I think the witness should be entitled to give his recollection of the discussion that was had there.

The Referee: Yes. The witness doesn't necessarily have to give you his conclusion on anything. He may relate what was said, what all the parties said.

Mr. Wellins: Well, let me reframe the question so we can get that answer in the record. Tell us, Mr. Howard, what was said by the parties present on the subject of a lump sum settlement of those three actions.

Mr. Horowitz: The witness didn't say there was

(Testimony of Alvin F. Howard.)

a discussion of a lump sum settlement of those three actions. He said it wasn't correct and then he was stopped and not permitted to answer. I think the witness should be permitted to state what took place.

The Referee: The witness may state the conversation.

Mr. Wellins: State the conversation, please, [33]  
Mr. Howard.

A. My recollection of it was that at that time we were most concerned in trying to——

Mr. Weber: No.

The Referee: Counsel, let's please abide by the orders of the Court with respect to the carrying on of this case.

Mr. Weber: Very well, Your Honor.

The Referee: If you can't do it then I am going to restrict you to one counsel; but please don't give us any background, Mr. Howard. Just tell us the conversation.

The Witness: Well, the tenor of the conversation was this, that we made an offer to pay the sum of \$5,000.00 which would be received by the Trustee in Bankruptcy; that by virtue of his attachment of Mr. White on the Gibbons note we would pay that sum, the Trustee would get it, and you, the attorneys for Mr. Gibbons and attorneys for the Trustee, would dismiss with prejudice the action of Quittner vs. Rosen, as I recall, the action of Quittner vs. White, and the Gibbons action.

Q. (By Mr. Wellins): Just so we tie it together, when you say Quittner vs. Rosen, that was the unlawful eviction case, and the Quittner vs.

(Testimony of Alvin F. Howard.)

White was the partnership action, and the other was the promissory note action?

A. The Gibbons action.

Q. The action between Gibbons and White.

A. Yes. We made that offer, for which there was to be [34] a dismissal with prejudice of each of those actions.

Mr. Wellins: No further questions.

The Referee: Any further questions?

### Redirect Examination

By Mr. Horowitz:

Q. Mr. Howard, did you know at that time or at any time prior to the payment of the money to Mr. Wellins shown in the receipt, Trustee's Exhibit 13, that the proceeds of the judgment or any interest in the judgment was owned by Mr. Quittner as Trustee for Al Herd?

Mr. Wellins: That is objected to as assuming facts not in evidence. The date of the judgment was far later than that so there could not have been any such discussion in those words.

The Referee: Overruled.

The Witness: Up to the time that judgment was paid and continuing through and after that time, I did not know that Mr. Quittner as Trustee had any interest in the action that Mr. Gibbons was bringing. In fact, at the time that we paid Mr. Gibbons, or thought we were paying Mr. Gibbons, I was worried that we would be faced with a demand at a subsequent time, for a subsequent payment, by Mr.

(Testimony of Alvin F. Howard.)

Quittner, and that was the reason we requested it be signed by Mr. Wellins as attorney for each of those parties.

Mr. Wellins: I move to strike everything after the [35] word "no" as not responsive to the question and as being a conclusion of the witness.

The Referee: Motion denied.

Q. (By Mr. Horowitz): And did you so tell Mr. Wellins? A. Yes, I did.

Mr. Horowitz: That is all.

The Referee: Any further questions?

### Recross-Examination

By Mr. Wellins:

Q. When was the first time that you found out about the pendency of the bankruptcy matter of Al Herd, bankrupt?

A. When I heard—when I first heard about the fact that Joe White was being sued by the Trustee in Bankruptcy.

Q. And what year was that? A. 1948.

The Referee: Well, that was before you paid the judgment, wasn't it?

A. Yes, considerably before we paid the judgment.

Q. (By Mr. Wellins): Did you at any time make an investigation of the records of the bankruptcy court in the matter of Al Herd, bankrupt?

A. Yes, I did.

Q. When?

(Testimony of Alvin F. Howard.)

A. The first examination that I recall was toward the end of our trial in the partnership [36] case.

The Referee: When was that, sir, what year?

A. We have the case in court here. It was in 1948, I believe.

Q. (By Mr. Wellins): What month in 1948?

Mr. Horowitz: Well, the trial——

Mr. Wellins: Just a second, if the Court please.

The Court: What are you doing, trying to trap this witness? Counsel is looking at the file.

Mr. Wellins: I'm trying to examine the witness without the assistance of counsel.

The Referee: I know, but after all, let's get along here. Counsel has the file. When was the trial?

Mr. Horowitz: The trial commenced on March 14th and the trial dates were March 14, 15, 16, 17, 31, 30, April 4, 5, 6, 8, 11, 12, 13, and 15.

I get that from the judgment.

The Referee: That settles that.

The Witness: It was I would say between the 1st and 15th of April, 1949.

Q. (By Mr. Wellins): And was that the first time, was that the first occasion that you ever examined the records of the Al Herd bankruptcy?

A. I think I may have looked at it earlier than that in the trial. The reason I recall this second occasion or other occasion so distinctly is that is the time I found in the file the facts with reference to the Trustee's interest [37] in the Gibbons action.

(Testimony of Alvin F. Howard.)

That is the first time I found that, but I may have examined the file earlier for a different purpose.

Mr. Wellins: All right. Now I move to—well, never mind. Let it stand.

The Referee: All right.

Q. (By Mr. Wellins): When did you first examine the records or files in the matter of Al Herd, bankrupt?

A. The very first time was at or about—let's say the beginning of the trial.

Q. The trial dates of which Mr. Horowitz just read off?

A. Yes, the end of March or the early part of April.

Q. Of 1949? A. Right.

The Referee: All right, gentlemen, it is 12 o'clock. This is off the record, Mr. Singeltary.

(Discussion off the record.)

The Referee: All right, continued to January 27th, today at 1:30 p.m.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [38]

Friday, January 27th, 1950—1:30 P.M.

The Referee: Any further questions of Mr. Howard?

Mr. Wellins: Yes, if the Court please.

Q. Mr. Howard, did you know that the Trustee was suing Mr. Gibbons for damages for usurious interest charged Mr. Herd? A. Yes.

Q. You knew about the case which has been described as No. 7870-Y? A. Yes.



(Testimony of Alvin F. Howard.)

Q. Quittner vs. Gibbons? A. Yes.

Q. And when did you first examine the file in that case?

A. The file itself will contain the date of my first examination. I went up there and got photostats of certain of the pleadings and the date that I got those photostats appears in the file, and that is the date that I first saw it.

Mr. Wellins: Very well. Does Your Honor have that file?

The Referee: What became of that one?

The Witness: That was before the motion for summary judgment was heard, however, if that is helpful. [39]

Q. (By Mr. Wellins): All right, passing from that until we get the file, for the moment, can you tell me the date of the receipt—oh, withdraw that question, please.

Can you by referring to the file in case 7870-Y which I now show you tell me that date, Mr. Howard? A. Yes; August 12, 1948.

Q. Thank you; and at that time you read the file in that case; is that correct?

A. Yes, I did.

Q. All right. Now can you tell me the date upon which you received the file in the promissory note action from Cannon & Callister's office?

A. I can't tell you exactly except that my recollection is that it was shortly after you had made your motion for summary judgment.

(Testimony of Alvin F. Howard.)

Q. I see. Would you say within a month after that, or can you——

A. I think it was less than that. I think it was heard within a month after that.

Q. Within a week?

A. I don't know. My recollection is that at the time I first saw the file your motion had been made and needed to be defended, and that was the status of the file when I first saw it.

Q. All right, the motion was filed about July 15, 1948, so would it be accurate to say that you received those papers [40] from Cannon & Callister's office say one week following that date?

A. I'm sorry, I can't tell you whether it was a week or a month or two weeks, but my recollection for what it is worth is that it was shortly after the motion was filed, which would be shortly after July 15th; but whether that "shortly after" means a month or a week I can't tell you.

Q. Somewhere not over a month?

A. I feel certain that is correct.

Q. Do you have some receipt that indicates the transfer of papers to you from the Cannon & Callister office?

A. I don't believe so. Mr. Horowitz has the file.

Mr. Horowitz: If this would be of any value, I notice in our file a letter from Cannon & Callister to Mr. White in which he states he has been served with notice of motion and affidavit and substitution of attorneys in the Quittner vs. White suit; and then he states: "Since most of your matters

(Testimony of Alvin F. Howard.)

are now being handled by Mr. Horowitz, it occurs to me this matter should also be handled by him. I would appreciate a telephone call from you in this regard"; and the substitution of attorneys is dated August 4th and I notice there was a copy mailed to Messrs. Wellins and Weber on the 4th of August; so it would be some time between July 14th and August 4th.

Mr. Wellins: July 14th is the date of the letter to which you had reference in the beginning of your remarks? [41]

Mr. Horowitz: Yes. That wasn't a letter to me. It was a letter to Mr. White who brought it into the office, and between that date and August 4th we got the file.

Q. (By Mr. Wellins): Now, Mr. Howard, is it true at the same time you were present at the conference with Mr. Weber about which you testified, that at the conclusion of the conference you served upon Mr. Weber at your office an Amended Answer to the promissory note action, and a Cross-Complaint?

A. I don't know when that was served with reference to the time of the conference.

Mr. Wellins: No further questions.

The Referee: Any further questions?

Mr. Horowitz: No, no questions.

The Referee: All right, step down. Any further evidence on the first defense? Have you any, counsel?

Mr. Wellins: Do I understand that you have

nothing further to put on, Mr. Howard?

The Referee: You put on what you want to put on and then we will ask the other side.

Mr. Wellins: Well, we will wait until Mr. White is examined, Your Honor, to see whether there is any further evidence we wish to offer.

The Referee: All right, do you gentlemen have any evidence?

Mr. Howard: Yes, if Your Honor please. [42]

### JOSEPH G. WHITE

called as a witness, being first duly sworn, testified as follows:

The Referee: And what is your name?

The Witness: Joseph G. White.

The Referee: All right, proceed.

### Direct Examination

By Mr. Howard:

Q. Mr. White, at the time that the judgment was paid in the Gibbons action against you, that is at the time of our visit to Mr. Wellins' office when you gave him some checks, did you know at that time that the money was being paid on an obligation to Mr. Quittner as Trustee?

A. No, I didn't.

Mr. Wellins: If the Court please, I move to strike the answer for the purpose of making an objection; and I object to the——

The Referee: Wait a minute. Motion granted. Proceed with your objection.

(Testimony of Joseph G. White.)

Mr. Wellins: I object to the question on the ground that it calls for the opinion and conclusion of the witness, on the ground that it is contrary to and an attempt to falsify the contents of the receipt which is Trustee's Exhibit 11 in evidence, and on the ground that it is incompetent, irrelevant and immaterial.

The Referee: The objections are overruled. The answer [43] may stand in the record.

Q. (By Mr. Howard): And to whom did you believe the money was being paid?

Mr. Wellins: The same objection, if the Court please, as calling for the opinion and conclusion of the witness and an attempt to vary the terms of the receipt.

The Referee: Overruled.

The Witness: I thought it was paid to Mr. Gibbons.

Mr. Howard: No further questions of this witness at this time, if the Court please. I understand the evidence now is being limited to a particular defense.

The Referee: Just the first defense, yes.

Mr. Howard: Yes.

The Referee: All right, cross-examine.

Mr. Wellins: May I see the receipt, if Your Honor please?

The Referee: Yes (handing document to counsel).

(Testimony of Joseph G. White.)

Cross-Examination

By Mr. Wellins:

Q. Mr. White, I show you this receipt marked Trustee's Exhibit 11 and ask you whether this is a copy of the receipt that was received by you at that time?

A. I never did receive the receipt. I think you gave it to Mr. Howard.

Q. I see. Is this a copy of the receipt that was given [44] to Mr. Howard at that time?

A. I have never seen it other—

The Referee: There is no question about that, Mr. Wellins. That is the receipt.

The Witness: I have no doubt it is the receipt but I didn't see the receipt. You gave it to Mr. Howard.

Q. (By Mr. Wellins): Now, when this receipt was prepared you were sitting in my office; is that right? A. That is right.

Q. And I dictated this to my secretary in the presence of you and Mr. Howard; is that correct?

A. That I don't recall.

Q. You heard me say in part, "These checks have been delivered to me as one of the attorneys for Francis Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, and receipt is acknowledged on behalf of Francis Quittner, as said Trustee, and as payment in full of the claim of George L. Gibbons against Joseph White, et al., Case No. 533306, Los Angeles County Superior Court, subject to any



(Testimony of Joseph G. White.)

adjustment which may be appropriate for disbursements to Sheriff, as the same may be hereafter ascertained''; is that correct?

A. I don't remember. I don't remember you dictating that in the office in my presence. I'm not saying you didn't, but I say I don't remember. If you did I didn't pay any attention to what you were dictating.

Q. However, you were there, were you not? [45]

A. Absolutely.

Q. Mr. White, you knew, did you not, that on the day we got those—the day I received those checks, namely December 14, 1948, that the Trustee was going to get that money; is that right?

A. No, I didn't. I didn't owe Al Herd any money. Al Herd owed me money.

Q. My question is did you know that the money that you gave—that is, the two checks—to me, was going to go to the Trustee in Bankruptcy of Al Herd? A. No, sir, I didn't.

Q. Mr. White, I call your attention to the suit that was filed against you by Mr. Gibbons for the \$5,000.00 note. Is it true that you had certain negotiations with Mr. Gibbons in an attempt to settle that lawsuit? A. Yes.

Q. And is it true that those negotiations took place in the spring of 1948?

A. I think it was.

Q. And is it also true that in the course of those negotiations you had conversations with Mr. Gibbons in which he stated to you in substance,

(Testimony of Joseph G. White.)

“Mr. White, if you want to settle this matter you had better do so promptly because I am negotiating for a settlement with the Trustee in Bankruptcy”?

A. No, sir, absolutely not. [46]

Q. Is it true, Mr. White, that you had a conversation with Mr. George M. Wiener, one of the attorneys for Mr. Gibbons, prior to the time Mr. Weber and I became Mr. Gibbons’ attorneys, in which in the spring of 1948 Mr. Wiener stated in substance to you, “Mr. White, if you wish to effect a compromise of your claim with Mr. Gibbons you had better act promptly because Mr. Gibbons is negotiating a compromise of his claim with the Trustee in Bankruptcy of Al Herd”?

A. You are asking me if Mr. Wiener told me that?

Q. I am asking you if Mr. Wiener told you that, in substance and effect?

A. Never, in no way whatsoever, in any respect. Mr. Wiener did call me into his office and wanted me to give him a 1947 Cadillac convertible.

Q. In settlement of that action?

A. In settlement of that action, yes.

Q. When was that?

A. That was during the time after the note expired, I believe, or before the note expired. I can’t tell you the definite date, but it was before——

Q. What year was it?

A. What year did I sign the note? When was the note due?

Q. Well, do you recall the year in which you

(Testimony of Joseph G. White.)

had this conversation with Mr. George [47] Wiener?

A. I imagine it would be around the time that the note was delinquent or expired, the time that the note had expired.

The Referee: I think that is immaterial, counsel. Obviously it was between the time the note was executed and the time the note was paid.

Q. (By Mr. Wellins): Now, in that conversation with Mr. Wiener was anything said by you and Mr. Wiener on the subject of the negotiations between the Trustee and Mr. Gibbons in reference to settling a claim of the Trustee against Mr. Gibbons? A. No.

Q. You knew, did you not, that the Trustee had filed a lawsuit against Mr. Gibbons to collect damages for usurious interest, among other things, did you not? Is that right? A. No, I didn't.

Q. Your attorneys never told you that?

A. No.

Q. You have heard Mr. Howard testify about his examination of certain files in the Federal Court pertaining to the Trustee's lawsuit, in August—against Mr. Gibbons, in August, 1948?

A. Yes.

Q. And isn't it true that you signed a cross-complaint in the promissory note action setting up the same usurious [48] interest statistical information as Mr. Howard obtained from the Federal Court file?

A. I could answer it in this way—I can't answer

(Testimony of Joseph G. White.)

that question intelligently because I wouldn't know what you——

Q. Mr. White, I show you what purports to be your signature on a verification of an Amended Answer, Proposed Amended Answer, filed August 12, 1948, and ask you—and bearing a notarization of August 12, 1948, and ask you if that is your signature? A. Yes, it is.

Q. And I call your attention to the photostats attached to this Amended Answer marked Exhibit “A.” You saw them at the time you signed this paper, did you not?

A. I gave them to Mr. Howard.

Q. You gave them to Mr. Howard?

A. Yes.

Q. And you knew, did you not, that these papers came from the papers in the action filed by the Trustee against Mr. Gibbons?

A. I knew that they came from the Trustee's files?

Q. No, that isn't what I'm asking you. You knew that these photostats had been made of the papers that were on file with the Court in the Trustee's lawsuit against Mr. Gibbons?

A. Yes. Now, I'm not saying that I gave those photostats. [49] I gave these papers I think it was either to Mr. Howard or to you or to Mr. Callister, but these papers at one time were in my possession and I gave them to either you, Mr. Callister or Mr. Horowitz. Now, those photostats, I don't know any-

(Testimony of Joseph G. White.)

thing about them because I have never had any photostats made.

Mr. Horowitz: I think there is some confusion. When the witness refers to "these papers" he refers to the original and not the photostat which was given originally by Mr. White to the Trustee in Bankruptcy.

The Referee: All right.

Q. (By Mr. Wellins): Your testimony is that you gave the originals of the things of which these photostats are copies to Mr. who?

A. Either Mr. Callister or to you because you and Mr. Callister both asked me to get all the information I could get, all the papers I could get in regard to Al Herd's papers, that I had, and these happened to be some of the papers I had.

Q. And when did you have those papers? When did you get those papers?

A. Oh, I think that was when Al Herd first went into bankruptcy.

Mr. Wellins: I see. All right. Do you want to prove this by stipulation or do you want me to question the witness about it? [50]

Mr. Horowitz: Well, I think we can stipulate. It is a fact.

Mr. Wellins: I have here, Your Honor, the originals of the statistical information referred to by the witness.

Mr. Horowitz: That was prepared by an accountant. That is the one in evidence. We will stipulate that was prepared by an accountant for



(Testimony of Joseph G. White.)

Mr. White and given to the Trustee in Bankruptcy or to one of his attorneys.

The Referee: All right, Trustee's Exhibit 14.

Q. (By Mr. Wellins): Mr. White, referring to that Trustee's Exhibit 14 which has just been handed to the Judge, approximately when did you deliver that to Mr. Callister or to Mr. Weber or myself?

A. I would say the early stages of the Al Herd bankruptcy trial.

Q. Within the first month or two after Al Herd's bankruptcy was filed?

A. I think so, yes.

Q. A few moments ago Mr. Horowitz read a letter dated July 14th, addressed to you, from Mr. Callister. Did you receive that letter?

A. Yes, I did.

Mr. Wellins: May I see that, counsel?

Mr. Horowitz: Yes (handing document to counsel).

Q. (By Mr. Wellins): I show you this letter to help you refresh your recollection and ask you whether you were notified [51] on or about July 14, 1948, by Mr. Callister, that he had just been served with a notice of motion and affidavit and substitution of attorneys in the case of Gibbons vs. White?

A. Did I receive that letter?

Q. Yes. A. Yes, I received that letter.

Q. All right, and the substitution of attorneys referred to there was the substitution of Mr. Weber and myself in the place of Jones & Wiener as at-



(Testimony of Joseph G. White.)

torneys for Mr. Gibbons; is that correct?

A. Yes, sir.

Q. Now, you had been examined by Mr. Weber and myself on 21-A examinations here in the bankruptcy court; is that correct? A. Yes.

Q. That was prior to the date of July 14, 1948?

A. Yes.

Q. And on July 14, 1948, you knew that Mr. Weber and I were the attorneys for Francis F. Quittner, the Trustee in the bankruptcy of Al Herd? A. Yes.

Q. You did not file a claim in the Al Herd bankruptcy, did you?

Mr. Horowitz: I object to that, if the Court please, on the ground it is not proper cross-examination and has no—— [52]

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Were you present in the office of Mr. Fred Horowitz before the motion for summary judgment was heard in July or August of 1948, at a conversation in which Mr. Daniel Weber was also present? A. Yes.

Q. Now, Mr. White, did you ever examine any of the records or files of the Al Herd bankruptcy?

A. No, I haven't.

Q. You never have? A. No, sir.

Mr. Horowitz: Mr. Wellins, are you going to use that letter in evidence?

Mr. Wellins: No, I will return it to you. I just wanted it for a question. However, if you wish to have it in evidence I have no objection.

(Testimony of Joseph G. White.)

Mr. Horowitz: No. You asked for it and I produced it.

The Referee: Anything else?

Q. (By Mr. Wellins): Did you have a—referring now to the substitution of Mr. Fred Horowitz in the place and stead of Cannon & Callister, I call your attention to the fact that it has been stated that the written substitution was signed on August 4, 1948, and I ask whether it is a fact that Mr. Horowitz' office, Mr. Howard, was representing you some time prior to August 4, 1948, in connection with the [53] Gibbons promissory note action, before the formal substitution of attorneys was signed?

Mr. Horowitz: I don't quite understand that question.

The Referee: Do you understand the question?

The Witness: The only thing I could answer you, Mr. Wellins, would be I don't think Mr. Horowitz ever represented me legally while Mr. Callister was still my attorney. The reason Mr. Callister withdrew was on account of him being with the Morris Plan Bank. He couldn't represent us both. So that was my motive or Mr. Callister's motive in withdrawing. In other words, he couldn't represent me and the Morris Plan Bank at the same time when the Morris Plan Bank was suing me.

Q. (By Mr. Wellins): Mr. White, you remember that an appointment was made for you and Mr. Horowitz and myself to have a conference at Mr. Horowitz' office in or about the first week of July,

(Testimony of Joseph G. White.)

1948?      A. Yes.

Q. And you remember that at the last moment some business prevented you from coming to that meeting and you did not attend?

A. I think so.

Q. You received this letter of July 14, 1948, from Mr. Callister, mentioning and enclosing a copy of substitution of attorneys, Mr. Weber and myself being substituted in the place of Jones & Wiener for Mr. Gibbons in that promissory [54] note action. Prior to receiving that letter from Mr. Callister did you know that Mr. Weber and I were acting as attorneys for Mr. Gibbons in the promissory note action?

A. Yes. I thought you were.

Q. I see. When did you first think that?

A. Well, I think at the last meeting I had with Mr. Wiener, Mr. Wiener told me that he was going to withdraw or not represent Mr. Gibbons because Mr. Gibbons and Al Herd was too much for him to cope with, and that he was just going to——

Q. Don't tell me what Mr. Wiener told you. I just want——

A. You asked me when I assumed that you were his attorney. That is when I assumed that you were his attorney; right after I think it was the time that I was summoned here for a meeting or something, I saw Mr. Gibbons sitting at your table there and you talking to Mr. Gibbons, and after what Mr. Wiener told me I thought that you were representing him.

(Testimony of Joseph G. White.)

Q. Now, in what month was that?

A. Oh, that I couldn't say. That was during the bankruptcy.

Q. Was it in 1948?

A. Well, it was during the Al Herd bankruptcy trial.

Q. Well, was it on the day that Mr. Gibbons testified on the 21-A examination during the bankruptcy hearing?

A. I don't recall whether he testified or not. I know [55] he was here, though.

Q. But it was at or about the time that he was testifying, is that correct, here, under the 21-A examination?

A. That I can't say. I can't say whether he testified or not. All I know is that Mr. Gibbons was present.

Q. All right, was it on one of the days you testified on 21-A examination?

A. I think it was on one of the days I was supposed to testify and they didn't call me but Mr. Callister asked me to be here.

Q. Well, in trying to fix the date now of this event of your knowledge of Mr. Weber and I appearing in this case representing Mr. Gibbons, it would be some time before your last testimony under 21-A examination; is that correct?

Mr. Horowitz: That is objected to on the ground it is immaterial. I don't know why we are taking so much time——

The Referee: Sustained. Proceed.

(Testimony of Joseph G. White.)

Q. (By Mr. Wellins): Now, when you first say you knew that Mr. Weber and I were representing Mr. Gibbons, you knew that we were at the same time representing Mr. Quittner, the Trustee in bankruptcy of Al Herd; is that correct?

A. Yes.

Q. And from the time you first acquired that knowledge up until and including the 14th day of December, 1948, when you paid out those two checks to me, you remained under that [56] same impression; is that correct?

A. That you were attorneys for Rusty Gibbons, for George Gibbons?

Q. As well as for the Trustee. A. Yes.

Q. Now, when did you first find out that the Trustee had compromised his claim with Mr. Gibbons? A. That the Trustee——

Q. Yes. Do you understand my question?

A. Yes. At no time did I ever know that.

Q. You had not known it until today when I just mentioned it to you? A. That is right.

Q. This is the first moment you have known it; is that right?

A. That is right. No, I shouldn't say just now. I knew it after it was brought to my attention in Mr. Howard's office. I shouldn't say just now, no.

Q. Well, when did Mr. Howard bring it to your attention in his office, Mr. White?

A. Well, when he explained to me—I think that was maybe a week or two after our trial, when I was tried in Judge Stephens' court.



(Testimony of Joseph G. White.)

Q. You are referring to the accounting and unlawful eviction suits in the Superior Court, Judge Stephens' court?

A. I don't know what it was. [57]

Q. All right.

A. Well, maybe a week or two weeks later, that is when Mr. Howard mentioned it to me, that I didn't actually pay that money to Rusty Gibbons, that the Referee in Bankruptcy got it.

Q. And that would be in about May of 1949?

A. Well, that was about a week or two after the trial in Judge Stephens' court.

Mr. Wellins: Very well. Is that correct, Mr. Horowitz, about May of 1949?

Mr. Horowitz: Yes, about May, the latter part of April or the early part of May, 1949.

Q. (By Mr. Wellins): Now, prior to that time you knew, did you not, that the Trustee had filed an attachment against you for the proceeds of the note, the Gibbons note? A. Yes, I did.

Q. When you spoke with Mr. Wiener, in the conversation you started to tell us about before regarding the representation of Mr. Gibbons, did you in that same conversation speak with him in connection with this settlement of the claim of Mr. Gibbons on the promissory note?

A. Yes, I did.

Q. In the conversation that was had in my office on the date of the signing of this receipt, do you remember that we talked about the fact that you were handing me a \$5,000.00 check drawn on the



(Testimony of Joseph G. White.)

American National Bank & Trust Company of [58]  
Chicago?           A. Yes.

Q. And you remember that we also talked about the fact that it would take a few days to clear that check because it was drawn on the Chicago bank?

A. That was a Cashier's Check I gave you.

Q. And do you remember we talked about the fact that even being a Cashier's Check it would take a day or two or three in order to have the check clear? Do you remember that?

A. No, I don't.

Q. Do you remember also that the other check you gave me was a check for \$1220.00?

A. Yes.

Q. That was drawn on the California Bank; is that right?           A. Yes.

Q. And we talked about the fact it would take a day or two to clear that check?

Mr. Horowitz: I object to that as immaterial.

The Referee: Sustained. Let's get along, counsel. You are taking too much time.

Q. (By Mr. Wellins): Do you remember that there was discussion at that same meeting to the effect that a satisfaction of judgment would not be given by Mr. Gibbons and the Trustee until the checks had both cleared? [59]           A. No.

Mr. Horowitz: We will object to that as immaterial.

The Court: Sustained, counsel.

Q. (By Mr. Wellins): Do you remember that this receipt was written because you desired some

(Testimony of Joseph G. White.)

written evidence of the delivery of the two checks to me at that date? Do you remember the discussion on that subject?

A. Mr. Wellins, I had no discussion with you whatsoever.

Q. I'm not talking about what you personally said. I am talking about what was said in your presence there.

A. You had no discussion with me, and the motive in giving you two Cashier's Checks—I could have given you a personal check, but that was the motive. I gave you two Cashier's Checks. That was supposed to be the same as cash.

Q. What I'm asking you is do you remember that being discussed?

Mr. Horowitz: We will object to that as immaterial.

The Referee: Sustained. Proceed.

Mr. Wellins: No further questions on this subject matter.

The Referee: Any further questions?

Mr. Howard: No, if Your Honor please.

The Referee: Any other witnesses?

Mr. Howard: No other witnesses, if the Court please.

The Referee: All right, any further evidence, counsel?

Mr. Wellins: Your Honor, I would like to be sworn as [60] a witness on behalf of the Trustee.

The Referee: All right, raise your hand and be sworn.

MARVIN WELLINS

called as a witness, being first duly sworn, testified as follows:

The Referee: All right, be seated and state your name in the record.

The Witness: Marvin Wellins.

Direct Examination

By Mr. Weber:

Q. Mr. Wellins, you are one of the attorneys for the Trustee in Bankruptcy in these proceedings? A. Yes.

Q. Do you recall a conversation with Mr. Fred Horowitz around July 1st of 1948, in which you discussed with him certain litigation in which Mr. White was a defendant? A. Yes.

Q. Where did that discussion take place?

A. In the office of Mr. Fred Horowitz at 325 W. 8th Street, Los Angeles.

Q. Was that conference had pursuant to a previous appointment?

A. There had been a telephone appointment made for that conference.

Q. Who called whom? [61]

A. I believe I called Mr. Horowitz.

Q. Tell us what was said.

A. I called Mr. Horowitz a few days prior to the conference and asked to make an appointment to speak with him on the subject of a full and final compromise of all litigation relating to Joseph G. White, the respondent here, including the promis-

(Testimony of Marvin Wellins.)

sory note action of Gibbons vs. White, the partnership accounting suit, and the unlawful eviction suit; and Mr. Horowitz stated that he would be willing to confer on that subject with me at his office, with Mr. White, and we made an appointment for a fixed date. I stated to Mr. Horowitz that by reason of a settlement made by the Trustee with Mr. Gibbons I was now in a position to compromise all three actions if we could get together on a figure.

Q. What else was said, if anything?

A. That is about the entire conversation as best I can recall it.

Q. Did you thereafter have a meeting with Mr. Horowitz?

A. Yes. I met with Mr. Horowitz at his office.

Q. Approximately when?

A. At the time arranged in our telephone discussion, which was a few days after the telephone discussion.

Q. Would this personal meeting be somewhere around July 1st, 1948?

A. Approximately the first week in July, 1948.

Q. Who were present? [62]

A. Just Mr. Horowitz and myself.

Q. What was said?

A. I said in substance to Mr. Horowitz that the Trustee would like to make a final disposition of these three lawsuits, the Gibbons against White, the accounting lawsuit, and the unlawful eviction lawsuit. Mr. Horowitz said that Mr. White was unavoidably prevented at the last moment from being

(Testimony of Marvin Wellins.)

present but that Mr. Horowitz would continue the conversation with me without Mr. White.

Mr. Horowitz asked me if I could give him a figure at which the three lawsuits could be settled. I said that if the Trustee could receive a total of \$20,000.00 that I would recommend to the Trustee that that sum be accepted in full and final disposition of the three lawsuits. Mr. Horowitz stated that that amount was entirely too high and that the amount he had in mind to offer was so much lower that without Mr. White being there he didn't want to make any statement on a figure, but that he would like to have further discussion on the subject of the compromise of the three law suits.

With that I left.

Q. Now, did this conversation take place prior to our service of the substitution of attorneys upon Cannon & Callister?

A. Yes. The service on Cannon & Callister of the substitution of attorneys, ourselves in the place of Jones & Wiener, [63] was made on or about July 14th or thereabouts, approximately two weeks after my first conversation with Mr. Horowitz.

Q. Now prior to this telephone conversation which you made to Mr. Horowitz, did there come a time when you had a discussion with Mr. Horowitz pertaining to our lending him the transcript of the 21-A proceedings?           A. Yes.

Q. Does this refresh your recollection—does this letter dated April 29, 1948, written by you to Mr. Horowitz, refresh your recollection as to the date

(Testimony of Marvin Wellins.)

upon which the transcript of the 21-A proceedings was delivered to Mr. Horowitz?      A. 1948, yes.

Mr. Horowitz: We will stipulate it was delivered on or about the date mentioned there. That is a partial transcript. You didn't have it all at that time.

The Referee: Counsel, why do we insist on going over and over those same things? That is all in here. You are just encumbering the record.

Mr. Weber: I didn't remember whether the record showed the date.

Q. And the completed transcript was delivered on or about May 12, 1948?

Mr. Horowitz: I will so stipulate.

Mr. Weber: And the entire transcript was returned [64] June 10, 1948?

Mr. Horowitz: I will so stipulate.

The Referee: All right, cross-examine.

### Cross-Examination

By Mr. Horowitz:

Q. Mr. Wellins, do I understand that in this conversation that you were supposed to have had with me on or about July 1st or during the first week in July of 1948 that I discussed with you the matter of the suit of Gibbons vs. White?

A. Yes.

Mr. Horowitz: That is all.

The Referee: Any further questions?

Mr. Weber: No further questions.



The Referee: Step down. Any other evidence on this side? Are you through now, Mr. Weber?

Mr. Weber: No, I would like to be sworn as a witness for the Trustee.

The Referee: I never saw a lawsuit like this where the only witnesses are lawyers.

DANIEL A. WEBER

called as a witness, being first duly sworn, testified as follows:

The Referee: Be seated and state your name in the record. [65]

The Witness: Daniel A. Weber.

The Referee: All right; proceed.

Direct Examination

By Mr. Wellins:

Q. You are one of the attorneys for the Trustee herein? A. I am.

Q. Did you have a conversation with Mr. Fred Horowitz in the year 1948? A. Yes.

Q. Where did that conversation take place?

A. In the office of Mr. Horowitz.

Q. And what was the date of that conversation?

A. The first of two of them took place July 28, 1948.

Q. Referring to the first of those conversations, who was present?

A. Mr. Horowitz and myself.

(Testimony of Daniel A. Weber.)

Q. And what was the substance of the conversation?

A. Mr. Horowitz said he would like to know whether or not the three pending actions, namely, Quittner vs. White, Quittner vs. Rosen, Rosen and White, and Gibbons vs. White, could be settled on a lump sum deal, and said he would recommend to Mr. White that Mr. White pay the Trustee \$5,000.00, the amount of the note, using that language, the amount of the note, in full settlement of the three actions. I said to Mr. Horowitz I could hardly recommend to the Trustee that he [66] go for that kind of a deal since I felt we had a good chance to get a summary judgment granted on the promissory note alone.

That was the substance of the conversation insofar as it dealt with this subject matter. There was some discussion by Mr. Horowitz about other litigation he had in the office, I think involving a man named Nebenzol. There was a reference to an attorney by the name of Mellinkoff.

The Referee: I think that is all immaterial. Go ahead.

Q. (By Mr. Wellins): Did you have another conversation with Mr. Horowitz at a later date?

A. I spoke to Mr. Horowitz on August 13th at his office, after receiving a telephone call a day or two earlier from Mr. Howard. I had a conversation with Mr. Howard on the telephone.

Q. Who was present at the second conversation?

A. Mr. White and Mr. Horowitz and myself, and

(Testimony of Daniel A. Weber.)

Mr. Howard was in and out of the room. I don't know whether or not he was there for the full length of the meeting, which wasn't too long.

Q. What was the substance of the conversation?

A. Mr. Horowitz said, "We would like to settle these three actions at one fell swoop," and he would recommend to Mr. White that Mr. White pay in addition to the \$5,000.00, the principal amount of the promissory note—"Well, we will see to it that you can get something in the way of attorney's [67] fees; the note says something about attorney's fees." And to use Mr. Howard's phrase, which was quite correct, I turned on my heel and left in a huff with the words, "That is practically a restatement of what you offered me last time when I was here and you got me down from Beverly Hills for this," and I walked out. On the way out I was served by Mr. Howard who called me, asked me to wait a moment, he had some papers to serve, and it was on my way out of the room, out of the office, that he handed me the Amended Answer and Cross-Complaint in the action entitled Gibbons vs. White and I gave him a receipt.

Mr. Wellins: I believe that is all. No further questions.

The Referee: Just one moment. I show you Trustee's Exhibit 9, which I think is a photostat of the record in the case of Gibbons vs. White, is it?

A. That is correct.

Q. What is the instrument that was served on you on the day you just mentioned in your testimony?

(Testimony of Daniel A. Weber.)

A. There were three documents served on me contemporaneously.

Q. Well, will you find it in the record there?

A. The papers served on me that day are not among those photostated here, Your Honor.

Q. Then the exhibit you are now examining is not a complete record of the case, is that it? [68]

A. It is not.

The Referee: All right. Cross-examine.

Mr. Howard: No questions.

The Referee: All right, step down.

Mr. Wellins: Does Your Honor wish to have the witness point it out? We have the original file in the case.

The Referee: No, I just wanted to see if it was in evidence here. It isn't in evidence. That is all right. Step down.

Have you any other witnesses, Mr. Wellins? Are you all through now?

Mr. Wellins: If the Court please, we will offer by reference, in order to complete the file, the documents served on Mr. Weber that day, namely, the Proposed Cross-Complaint, the Proposed Amended Answer, and the Notice of Motion and Motion for Leave to File Amended Answer and Cross-Complaint, and Points and Authorities in support thereof, all in the case of Gibbons vs. White, case No. 533306.

The Referee: I don't think it is necessary to encumber the record if it is stipulated those papers were so served that day.

Mr. Horowitz: We will so stipulate.

The Referee: Anything more?

Mr. Wellins: It might have another bearing on the issues on the subject of *res judicata*, in addition to the identification of the records, Your [69] Honor.

The Referee: Counsel I can't accept anything by reference from anybody's file but my own.

All right. Any other witnesses?

Mr. Wellins: Well, may we in line with the stipulation that we had at the earlier hearing have a number reserved for these documents and supply the photostats to the Court?

The Referee: If there is no objection you may furnish photostats of the instruments in question. If, as, and when they are received they will be marked as the Trustee's exhibits then next in order. Any objection?

Mr. Horowitz: No, no objection.

The Referee: All right. Anything further now?

Mr. Wellins: Not on this side, Your Honor.

The Referee: All right, gentlemen, is there anything further?

Mr. Howard: May we put Mr. Horowitz on the stand, Your Honor?

The Referee: All right. We might as well have them all.

## FRED HOROWITZ

called as a witness, being first duly sworn, testified as follows:

Mr. Wellins: Your Honor, I would like to correct a statement I just made. We have two further witnesses who will be able to testify on the subject relating to *res judicata*—— [70]

The Referee: This is the time for the trial, counsel.

Mr. Wellins: They are both attorneys, Your Honor, and they are both engaged in trial this afternoon.

The Referee: I'm sorry, counsel. The matter is ruled on. All right, proceed.

Mr. Wellins: I realize the ruling, Your Honor. I am stating this with the utmost respect to the Court's ruling.

The Referee: I'm sorry. We are going forward.

## Direct Examination

By Mr. Howard:

Q. Mr. Horowitz, when did you first find out about the action Mr. Gibbons had commenced against Mr. White?

A. A few days after July 14th, 1948, and that was the first time I ever heard of the existence of such action.

Q. And did either Mr. Wellins or Mr. Weber advise you at any time that they had settled with Mr. Gibbons so that they were then the owners of



(Testimony of Fred Horowitz.)

the claim that Mr. Gibbons was urging against Mr. White?      A. Never at any time.

Q. Did they ever tell you that they had settled or compromised that claim in any way?

A. Never at any time.

Q. Do you recall the conversation that was referred to [71] by Mr. Wellins of July 1, 1948, held in your office?      A. Yes.

Q. Would you relate that conversation?

A. Well, I would like to say in connection with that that there was no conversation or discussion of the case of Gibbons vs. White. As I said before, the first time I ever knew of the existence of that suit was subsequent to July 14, 1948, and I did not at any time prior to that time discuss with Mr. Wellins the settlement of a suit in which I was not attorney and which I did not know the existence of. I did discuss with Mr. Wellins the litigation, or the conversation with Mr. Wellins was concerning the litigation against Mr. White. I told Mr. Wellins that Mr. White had been imposed upon, that because Mr. Herd had defrauded Mr. White's brother-in-law Mr. White had foolishly signed a note to the Morris Plan Bank for \$25,000.00 and had put up his orange grove for security for that, that he had also signed a note of \$5,000.00 to a Mr. Gibbons, that he had also let Mr. Herd have other monies, and Mr. White was being punished for trying to be a decent individual, and that I thought this proceeding was as wrong as could be and the action should not proceed.

(Testimony of Fred Horowitz.)

At the second conversation when Mr. Wellins came in, he told me he was in a very generous mood, that he had settled some litigation and since he had settled some litigation he thought that this litigation of White ought to be settled. I told him—I asked him what he had in mind and he said he [72] had in mind some \$20,000.00, and I said that Mr. White had been hurt enough, had been hurt bad enough, and that to pay that much more money would simply be to bankrupt him, and if Mr. White lost the litigation he would be bankrupt but that was a risk Mr. White would have to take.

At the second conversation I said as far as the Gibbons note is concerned I thought it was too bad but apparently we would have to pay that note to Mr. Gibbons, and I offered to pay the amount of that note and some attorney fees. That was rejected, and I said I wouldn't pay anything in connection with the Quittner suit against Mr. White.

Q. When did you first find out that the Trustee had acquired an interest as owner of the Gibbons action or note?

Mr. Wellins: I object to that assuming facts not in evidence, contrary to the evidence. The assignment of the proceeds is in evidence, and the question is contrary to the evidence.

The Referee: Well, let's not quibble about that now. Perhaps counsel can rephrase the question.

Mr. Howard: I will rephrase the question.

Q. When did you first find out that Mr. Gibbons had made a compromise with the Trustee

(Testimony of Fred Horowitz.)

whereby the Trustee acquired some interest in the Gibbons note or the proceeds thereof?

Mr. Wellins: I object to the form of the question because the words "in the Gibbons note" again assume facts not [73] in evidence and contrary to the evidence.

Mr. Howard: I will rephrase my question again.

Q. When did you first find out about the settlement between the Trustee and Mr. Gibbons?

A. During the pendency of the litigation of the Trustee against Mr. White that we tried those many days before Judge Stephens.

Q. And with reference to the trial of the action, was it before or after or during the trial?

A. It was during the trial of the action.

Mr. Howard: No further questions.

The Referee: Cross-examine.

### Cross-Examination

By Mr. Wellins:

Q. When was the second conversation that you state that you had with me?

A. I can't recall it by date, Mr. Wellins.

Q. Well, what month? What month was it in?

A. I just can't recall the date. I would just be guessing.

Q. In any event, it was after you had knowledge of the suit between Mr. Gibbons and Mr. White?

A. Yes. That I am sure of.

Q. And was it before or after you had become Mr. White's attorney in that suit? [74]

(Testimony of Fred Horowitz.)

A. Well, it was after I had become Mr. White's attorney in that suit. I am sure of that.

Q. And what was the \$20,000.00 to be for, Mr. Horowitz?

A. Well, what you wanted the \$20,000.00 for, as I understood it then, was to settle the litigation of Quittner vs. White. That is the partnership suit. The discussion with reference to the unlawful detainer suit, that was just in the discard. There was hardly a word of discussion about that at all, about that suit. It wasn't worthy of a suit.

Q. What did you understand—withdraw that. This \$20,000.00 was to be given, was it not, for a dismissal of—strike that. This \$20,000.00 was to be given in full settlement of the three pieces of litigation, the Gibbons vs. White suit, the partnership accounting suit, and the eviction suit; is that correct?

A. Well, I don't know that I can answer it quite that way. You were urging me to induce Mr. White to make a settlement, and you said that \$20,000.00 would settle it. I imagine that the \$20,000.00 would have more than settled it because we didn't intend to pay anything like \$20,000.00.

Q. I'm not concerned with the amount. I am concerned with what it was for. What was the \$20,000.00 to be settlement for as I requested it?

A. As I understood it, that was for the Quittner vs. White only. Our principal discussion always was in connection with Quittner vs. White. It wasn't Gibbons vs. White. [75]

(Testimony of Fred Horowitz.)

Q. Now, Mr. Horowitz, did you know at that time that Mr. Weber and I had been substituted as attorneys for Mr. Gibbons in the Gibbons vs. White lawsuit?

A. Well, the second time I talked to you—and when I say the second time, I might have talked to you some other times in between or before or after, I don't recall which, but surely after I was substituted as attorney in the place and stead of Cannon & Callister the files showed that you had been substituted as attorneys for Mr. Gibbons.

Q. Isn't it rather correct, Mr. Horowitz, that your formal substitution in the place of Cannon & Callister took place on August 4, 1948?

A. That is right.

Q. And isn't it correct that you and I had this conversation which you refer to as the second conversation quite a good deal prior to August 4, 1948, probably a month or so prior to that? Isn't that correct?

A. Oh, we had conversation before I knew of the existence of the litigation of Gibbons vs. White, certainly, but I never, Mr. Wellins, talked to you about a lawsuit in which I was not attorney of record or attorney in fact.

Q. As a matter of fact, Mr. Wellins, this so-called second conversation that you testified on direct examination that you had with me was held on or about the first week of July of 1948; is that correct?

A. Oh, no, no, no. [76]

Q. And as a matter of fact you and I had only



(Testimony of Fred Herowitz.)

one discussion and not two discussions on the settlement of these three matters?

A. Oh, I would say more than two; not only two, I would say more than two.

The Referee: Are you confused in these conversations that—are you confusing any of the conversations that you say were had with Mr. Wellins with any conversations you had with Mr. Weber?

A. Well, Judge, I consider them both at the same time. I talked to Mr. Weber a less number of times than I talked to Mr. Wellins.

The Referee: I see. All right.

A. I talked to—Mr. Weber was out in Beverly Hills and I was downtown and Mr. Wellins was downtown.

Q. (By Mr. Wellins): Isn't it rather correct, Mr. Horowitz, that you spoke to me on the first of the discussions regarding this compromise and settlement, and you spoke to Mr. Weber in your office on the second and third conversations, all of which were held at your office?

A. Every conversation was held at my office. I never went to your office at any time to have any discussion. So all of them took place in my office.

Q. And there were three, weren't there?

A. I would say there were more than three.

Q. You would? [77] A. Yes.

Q. Do you have any dates?

A. I don't, but I will say this, it is an utter impossibility for me to have discussed and the fact is that I did not discuss the settlement of Gibbons



(Testimony of Fred Horowitz.)

vs. White, and couldn't have, prior to a few days after July 14, 1948.

Q. Mr. Horowitz, did you ever make any examination of the bankruptcy files in the matter of Al Herd, bankrupt?

A. After this proceeding was started and one time when we were waiting I looked at the file here.

Q. When you say "this proceeding," you mean the hearing on this order to show cause?

A. Yes.

Q. But prior to that time you had never made any examination of the bankruptcy file?

A. No.

Q. When did you first learn that Mr. Weber and I were attorneys for the Trustee in Bankruptcy of Al Herd, bankrupt?

A. Well, I was representing Mr. White in that litigation. I knew you were attorneys in that litigation.

Q. Well, may we fix a date for that?

A. Give me the—may I have my file of Quittner vs. White?

The Referee: Can't we shorten it? It was long before judgment was secured against Mr. White in the Gibbons suit?

The Witness: Oh, yes. [78]

The Referee: I think that covers it.

Mr. Wellins: Yes, that will be sufficient.

The Referee: Go ahead.

Q. (By Mr. Wellins): And it was also long before these two conferences or conversations you

(Testimony of Fred Horowitz.)

mentioned regarding a compromise of these matters?

A. It was shortly after the first transcripts were received because I recall telling Mr. Weber I would appreciate an opportunity to examine the transcript to see what the case was all about.

Q. That is right. That would be in about March of 1948; is that correct?

A. That would be right.

Q. Very well. At that time—strike that. And when did you first find out that we were also representing Mr. Gibbons?

A. I found out about that shortly after July 14, 1948.

Q. I see. And did you see the form of receipt which is Trustee's Exhibit No. 11 here?

A. Actually I didn't. I told Mr. Howard to take care of the matter. I assumed that he did, and I paid no further attention to it.

Q. I see. Did you know in July of 1948—strike that. Did you know in August of 1948 that the Trustee was suing Mr. Gibbons for damages for usurious interest, among other things? [79]

A. Well, now, when it comes to a precise date I can't say, but some place in all of this maze of litigation that Mr. White found himself in I was informed that there was some suit on the part of Mr. Gibbons—against Mr. Gibbons by the Trustee, and I thought it had to do with usury. Now, somebody told me it had to do with usury although I never have seen that petition up to this moment. I have never seen that complaint.

(Testimony of Fred Horowitz.)

Q. Well, I call your attention to the fact that your office as attorneys for Mr. White filed the Proposed Amended Answer in the Gibbons vs. White case on August 16, 1948, it having been sworn to by Mr. White on August 12, 1948, in which the statistical information identical with that used by the Trustee in the Federal Court action against Mr. Gibbons for usurious interest was used, and ask you whether or not it is a fact that you knew on or about August 12, 1948, about the pendency of the Trustee's suit against Mr. Gibbons in the Federal Court?

A. I was informed by Mr. White that an accountant who had worked on his behalf had prepared some papers which showed the commission of usury by Mr. Gibbons, and Mr. White stated that it had been given in the Bankruptcy Court, and Mr. Howard did what had to be done thereafter to get a copy of it.

Q. Now, you mentioned that I told you that I had settled some litigation. Was what I told you that the Trustee [80] has compromised his claim with Mr. Gibbons?

A. No.

Q. Isn't it a fact that you knew at the time of the second conversation about which you have testified on your direct examination that Mr. Weber and I were speaking to you with a view toward the settlement of three pieces of litigation, the Gibbons suit and the two suits by the Trustee against Joseph G. White?

A. You see, at the time I had the conversation

(Testimony of Fred Horowitz.)

a summary judgment had not been granted. I wanted to settle that suit and I said I would pay a certain sum in connection with that suit. I also—and that was in your capacity as attorney for Mr. Gibbons. I also told you at that time I would like and would want the other litigation disposed of and as to the other litigation I didn't propose to pay anything, and never at any time did I offer to pay as much as one cent for the disposition of the other litigation, and I told you that I couldn't afford to because if we accepted—if we assumed any liability then we would have difficulty because there had been some liens for—some liens by the Franchise Tax Commissioner or some other state agency, I don't recall the name now, for some \$17,000.00 against Mr. White, and I wouldn't pay you anything on that under any consideration.

Q. Isn't it true that you told me that whatever sum you would pay, \$5,000.00 that you mentioned in your direct testimony [81] with regard to that second conversation, was to be—was being paid or would be paid only on condition that all matters of litigation, including the Gibbons note and the other two lawsuits, were settled at that time?

A. Well, it just didn't get that far. I had a brief conversation with you, and then when Mr. Weber came in the conversation was even more brief because when I said I would only pay the \$5,000.00 and attorney fees on the Gibbons note and would pay nothing on the other, Mr. Weber turned

(Testimony of Fred Horowitz.)

on his heel and he left the office in a huff and that ended the conversation, which was very brief.

The Referee: Anything else?

Q. (By Mr. Wellins): Did you condition whatever offer you made to Mr. Weber upon the dismissal with prejudice of the cases of Quittner vs. White on the partnership accounting, the Quittner vs. Rosen and White on the unlawful eviction——

A. No, I just didn't have time, if I had wanted to put some conditions, because when I had suggested paying him nothing on the Quittner suits he left in a huff. I wouldn't discuss it with him after that under any condition.

Q. Did you hear Mr. Howard testify on that subject? A. Well, I am now testifying.

Mr. Wellins: That is all.

The Referee: Any other evidence?

Mr. Howard: That is all.

The Referee: Are you all through?

Mr. Wellins: We only have the two witnesses I mentioned [82] before, both attorneys and both in trial and I cannot produce them this afternoon, Your Honor.

The Referee: All right, no other evidence available at this time. All right, the Court holds that the first separate and distinct defense is not well taken. The second separate and distinct defense——

Mr. Wellins: Will the Court hear argument on that?

The Referee: No, I don't care to have any argument.



"The Trustee incorporates herein by reference each and every allegation contained in the first separate and distinct defense herein set forth."

Paragraph II: "Thereafter and on or about December 17, 1948, respondent White, who was the defendant and judgment debtor in said promissory note action, paid the sum of \$6220.00 in full satisfaction and discharge of said judgment.

"By reason thereof, respondent White is estopped and precluded from making any attack upon said judgment," etc.

Any further evidence on that, Mr. Wellins?

Mr. Wellins: May we understand which of these paragraphs are admitted by the parties as we did on the first defense, Your Honor?

The Referee: I think Paragraph II is admitted, is it not, gentlemen?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph III is a conclusion [83] of law. Any further evidence? Naturally, gentlemen, all the evidence applies to all phases of this case. It doesn't have to be repeated on each separate phase of the case.

Mr. Howard: Surely.

Mr. Wellins: We have the same two witnesses, Your Honor, to offer testimony. I think their testimony will probably be relevant to this second affirmative defense as well.

The Referee: Your haven't them available now?

Mr. Wellins: No, Your Honor. Unfortunately they are both engaged in trial this afternoon.

The Referee: All right, the second separate and



distinct defense is not well taken.

The third separate and distinct defense, Paragraph II:

“At the time respondent White paid, satisfied and discharged said judgment as aforesaid, he knew that the proceeds of said judgment inured and belonged to, and had been assigned by Gibbons to the Trustee in Bankruptcy herein.”

Obviously they will not stipulate to that.

Mr. Howard: No.

The Referee: Do you have any further evidence?

Mr. Wellins: The same two witnesses, Your Honor, will testify to matters relevant to that issue.

The Referee: All right, the Court holds that the third separate and distinct defense is not well taken.

We will take the recess at this time.

(Recess) [84]

The Referee: All right, gentlemen, let's proceed to the fourth separate and distinct defense, and this concerns action No. 542,157 wherein the Trustee sued the respondent White. I assume the allegations of Paragraph I are admitted?

Mr. Howard: Except in one respect, if the Court please. The allegation is that the action was filed for an accounting by the defendant of all matters and transactions between the bankrupt and the respondent. The action was not filed for an accounting in respect to all matters and transactions between the bankrupt and the respondent but only an ac-

counting on account of a dissolution of partnership which it was alleged existed.

The Referee: Well, now, let's see what we have got in evidence on that.

Mr. Wellins: I might say the language of the paragraph is more limited than you indicated, counsel. It says all matters and transactions between the bankrupt and the respondent in respect to the bankrupt's business conducted at 7077 Sunset Boulevard, Los Angeles, California.

The Referee: Well, I find that we have Trustee's Exhibit 10 here, being a portion of the record in the case in question, but apparently it does not include the complaint.

Mr. Horowitz: May we offer the complaint in evidence, as to the contents of it, and we will have the photostat ordered on that.

Mr. Weber: Is the answer in the record, Your Honor? [85]

The Referee: Well, here is what we have as part of Exhibit 10: Answer of Defendants Joseph G. White and Filmiland Motors; Memorandum for Setting for Trial; Copy of Minute Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Trial; and Notice of Entry of Judgment; and that is all, apparently.

Mr. Horowitz: I see. All right. Then we will offer the complaint so we will have a complete record, Your Honor.

Mr. Weber: I may have an extra copy. I'm searching for it now.

The Referee: Well, if you have we will put it in right now.

Mr. Horowitz: This is a copy. That will be fine. We don't have to have a photostatic copy of it.

The Referee: All right. This appears to be White's Exhibit No. 2. All right, it will be marked White's Exhibit 2.

Now then, the allegation as to what the suit was for becomes immaterial because the complaint itself is in evidence.

All right, that disposes of Paragraph I.

Paragraph II I think is immaterial because it seeks to describe the action. That is all Paragraph II is, isn't it, Mr. Wellins?

Mr. Wellins: That is correct, your Honor.

The Referee: Well, we have got the complaint here so [86] that tells us what the action is.

Paragraph III, on April 12 the respondent filed his answer. Said action was thereupon duly litigated and final judgment entered therein on May 16th in favor of Respondent White. Well, we have that in evidence. In other words, the judgment, whatever it is, and the findings, are here.

Paragraph IV:

"The alleged indebtedness of the bankrupt to respondent White asserted in the respondent's amended answer here, arose out of the transactions directly involved in said accounting action; and that the claim or counterclaims of respondent White asserted herein arose out of the transactions set forth in the complaint in said accounting action as the foundation of the plaintiff's claim in said action."

Well, again that is simply counsel's view of what

the situation is, and we have the papers here.

Paragraph V :

“At no time in said action did the respondent, either in his pleading or during the trial or at any other time, assert any claim, counterclaim or cross-complaint against the bankrupt or the Trustee in Bankruptcy herein.”

Well, so far as written pleadings or claims are concerned, we have the record, and I assume that is what is meant by Paragraph V. Is that right, Mr. Wellins?

Mr. Wellins: Yes, Your Honor.

The Referee: All right, Paragraph VI: [87]

“By reason of the premises, the respondent is estopped and precluded under and by virtue of Section 439 of the code of Civil Procedure of the State of California, from maintaining any proceeding upon, or asserting or claiming any indebtedness, offsets or counterclaims alleged in the respondent's amended answer herein.”

Well, suppose we get down to the meat of it now and let me see if I can find out what the complaint is about.

The caption of the complaint, which of course means very little, is “Complaint (Action for Partnership Accounting).”

Well, Paragraph X of the complaint alleges that the bankrupt Herd and White entered into an oral agreement of partnership. Then Paragraph XI says that in the month of May, 1947, the bankrupt and White orally modified and supplemented said agreement of partnership.

Paragraph XII, that they conducted the partnership business; Paragraph XIII, that in the month of July, 1947, White excluded the bankrupt from further participation in the business, etc., and took sole possession of the premises and the personal property.

Paragraph XIV, that White repudiated the partnership.

Paragraph XV, defendant White thereupon caused a corporation to be organized.

Paragraph XVI, that subsequent to his taking exclusive possession defendant White wrongfully did induce said sublessor to declare the lease cancelled, etc. [88]

Paragraph XVIII, that at divers times in and during the month of July, 1947, defendant White wrongfully took and converted to his own use certain funds, checks and instruments for the payment of money belonging to said partnership.

Paragraph XIX, that White either directly or through the corporation mentioned continued in possession of the demised premises and continued to operate the business.

Paragraph XX, that the bankrupt personally paid certain employees.

Paragraph XXII, that White has failed and neglected to contribute to the partnership his agreed capital contribution.

Paragraph XXV, that by reason of the aforesaid acts and conducts of defendants White and of Angel Motors (Filmland Motors), the business and good-will of said partnership have been totally destroyed, and the bankrupt's right, title and interest



therein have been rendered entirely valueless; by reason thereof, the bankrupt has been damaged in the sum of \$50,000.00.

Paragraph XXVII, that defendant White has failed to render to the bankrupt or plaintiff any accounting of his acts and conduct subsequent to his taking of possession of said demised premises, and his operation of said business, despite due demand therefor.

Wherefore, plaintiff prays judgment:

(a) dissolving said partnership; [89]

(b) requiring defendant White to account for all acts, transactions, matters and happenings pertaining to and arising out of said partnership;

(c) requiring defendant White to make contribution in accordance with Section 2434 (d) and (e) of the Civil Code, and also of the unpaid capital contribution referred to in Paragraph XXII hereof;

(d) requiring defendant White to reimburse plaintiff to the extent of one-half of the amounts personally paid by the bankrupt on account of partnership liabilities, as alleged in Paragraphs XX and XXI hereof;

(e) requiring defendant White to account for the funds, checks and instruments for the payment of money and other property belonging to the partnership and taken and converted by him to his own use, or received by him;

(f) requiring defendant White to account for the profits, gains, issues and emoluments resulting



from his wrongful procurement of the White lease to his nominee, to wit, Angel Motors (Filmland Motors) and his wrongful operation of the business upon the demised premises for his own benefit;

(g) adjudging that the right, title and interest of defendants White and Angel Motors (Filmland Motors) or either of them, in and to the White lease and any renewals or extensions thereof, and in and to the demised premises, be held for the benefit of said partnership; [90]

(h) directing the sale of all partnership assets and the distribution of the proceeds to partnership creditors in payment of their claims;

(i) enjoining the defendants from making or suffering any transfer or other disposition of partnership assets, directly or indirectly;

(j) appointing a receiver pendente lite, and to carry out the provisions of the final judgment and decree to be entered herein;

(k) appointing a referee to take and state the account of said partners;

(l) adjudging that plaintiff recover of defendants White and Filmland Motors the sum of \$50,000.00 as damages.

Now, what do the findings say? We have those in Trustee's Exhibit 10.

Paragraph IV of the Findings finds that it is not true that during the month of May, 1947, or at any other time or at all, the bankrupt and the defendant White entered into any oral agreement of partnership of any nature whatsoever.

Paragraph VIII of the Findings, it is not true that there existed any partnership agreement between the defendant White and the bankrupt.

Paragraph XIV, it is true that defendant White hasn't paid any of the debts of the bankrupt. It is true that the defendant White did not contribute to any alleged partnership in the sum of \$65,000.00 or any part thereof. It is not true [91] that the defendant White agreed to contribute to any partnership as agreed capital contribution, or otherwise, the sum of \$65,000.00, or any part thereof, or any other sum.

Paragraph XV of the Findings, it is true that at the date of the filing of bankruptcy against the bankrupt, to wit August 6, 1947, there existed debts and liabilities of the bankrupt in excess of \$50,000.00. It is not true that said debts were partnership debts.

Paragraph XVI, it is not true that there was any partnership agreement, written or oral, between the bankrupt and the defendant White.

The Conclusions of Law simply are that the plaintiff is entitled to take nothing against the defendants or either of them. The defendants are entitled to a judgment against plaintiffs and each of them for their costs and disbursements herein; and that is the judgment.

Now, your contention is that by virtue of Section 439 of the Code of Civil Procedure the respondent White here should have asserted the claim which he makes here as a defense or a counterclaim or by way of cross-complaint in what you call the accounting action. Is that it?

Mr. Wellins: Yes, Your Honor.

The Referee: All right. Do you have Section 439 here? I will get it.

All right, here is Section 439:

“If the defendant omits to set up a counterclaim upon [92] a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff’s claim, neither he nor his assignee can afterwards maintain action against the plaintiff thereon.”

Well, now, let’s see what it is that Mr. White asserts here in his amended answer to the order to show cause.

On May 1, 1947, Mr. Gibbons commenced legal action and attached the bankrupt on account of money loaned. On or about May 19, 1947, White as a gratuitous accommodation to the bankrupt gave Gibbons his promissory note in the sum of \$5,000.00 in consideration of which the aforesaid attachment was released. On August 12, 1947, Gibbons commenced an action in the Superior Court in and for the County of Los Angeles entitled Gibbons vs. White. Said action was to collect the aforesaid promissory note. On or about December 24, 1947, the Trustee herein commenced an action in the United States District Court against the aforesaid

Gibbons claiming that Gibbons charged the bankrupt usurious rates of interest and that Gibbons secured an unlawful preference when he received the said White note for the sum of \$5,000.00. In connection with said action the Trustee caused White to be served with garnishment. During the month of June, 1948, the Trustee compromised and settled that action against Gibbons. Said settlement among other things provided that the said note in the sum of \$5,000.00 would be the property of the Trustee; that at the time of making said [93] settlement with Gibbons the Trustee's attorneys were aware that if White knew the Trustee had become the real party in interest in the said action originally commenced by Gibbons against White, that White would be able to assert offsets and defenses which were available to him against the Trustee but not against Gibbons; that the aforesaid note of White to Gibbons in the sum of \$5,000.00 was executed by White as an accommodation for Herd. White received no consideration for its execution. In addition to the execution of said note, White also executed a note in favor of Morris Plan Bank of California in the sum of \$25,000.00 as an accommodation for the bankrupt. As evidence of his obligation to White under the aforesaid two accommodation notes, the bankrupt gave White his note in the sum of \$30,000.00, no part of which has been paid.

All right. Now, Mr. Wellins and Mr. Weber, why do you say that the action which Mr. White here asserts and brings against the Trustee arises out

of the transaction set forth in the complaint as the foundation of the plaintiff's claim in the case of Quittner vs. White?

Mr. Wellins: I think in answer to that we should put in some more evidence in support of the contention of the Trustee.

The Referee: No, we are through with the evidence.

Mr. Wellins: We haven't been asked if we have any on this defense. [94]

The Referee: I don't see where any evidence is needed.

Mr. Wellins: Then I guess we had better make an offer of proof.

The Referee: What do you want to prove?

Mr. Wellins: We want to prove to the Court that the transaction was—what the transaction was in that lawsuit. Your Honor has read Paragraph V of Mr. White's Amended Reply here. He refers in that to a \$5,000.00 note and a \$25,000.00 note and a \$30,000.00 note. The \$30,000.00 note was from Herd to White, and the \$5,000.00 note was from White to Gibbons, and the \$25,000.00 note was from White to the Morris Plan Bank. Now, those were the transactions which were in evidence and which were in litigation in the partnership accounting suit.

Going on from there a moment, we have further documentary evidence and evidence which we will produce through Mr. White as to what the nature of the transaction was as set forth in the complaint and as brought forth in the testimony in that state court action, to show that this claim of Mr. White



here is based entirely upon this \$30,000.00 note that Mr. Herd gave to Mr. White, which was completely litigated, which was completely discussed, in the litigation on the accounting suit, and in which Mr. White filed no counterclaim. That \$30,000 note was in evidence. So was the \$5,000.00 note and the \$25,000.00 note. That was the financing transaction that was at the heart of the 'Trustee's [95] contention on the partnership. Mr. White came in to lend money to various people or advance money to various people in order to assist Mr. Herd in his financial difficulties. The Trustee contended that Mr. White did it in accordance with a partnership with Mr. Herd. The Court said that there was no partnership, but the evidence was all concerning these transactions that are described both in the complaint and referred to in this Paragraph V of the Amended Answer of Mr. White.

The Referee: Well, let's see what further documentary evidence you have.

Mr. Wellins: Yes, Your Honor.

Mr. Howard: If the Court please, I might make a preliminary objection to the introduction of evidence that might save time, if I might do it at this time.

The Referee: Yes.

Mr. Howard: Counsel has said he intends to introduce evidence to show the nature of the transaction between Mr. Herd and Mr. White, which was litigated in the action of Quittner vs. White. If the Court please, the issues in that case are now finally determined and binding on us in this hearing here.



It was determined at that time that the transaction which formed the foundation and basis of their claim was an alleged partnership agreement. That was the foundation of their claim. It has been decided in a fashion which is now binding upon us that there was no such transaction. [96] So it seems to me that there cannot now be evidence that any other claim arose out of that transaction because it has been finally determined that there was no such transaction.

The Referee: Well, that is why I just took it for granted there could be no further evidence here. We have got all the evidence. We have the complaint and the answer and the findings and the judgment.

Mr. Wellins: That is true but of course we don't plead the evidence when we draw the complaint, and the evidence is what is the transaction involved, and what counsel has said is only correct to the limited extent——

The Referee: Well, here is the section you rely on:

“If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint”——

Mr. Wellins: That is correct.

The Referee (Continuing): ——“as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain action against the plaintiff thereon.”

Now, what is the transaction set forth in the com-

plaint? The transaction set forth in the complaint is an agreement of partnership and a violation of that.

Mr. Wellins: That is right, but that is the manner in which the transaction is properly alleged for the purposes of a complaint. In order for this Court to determine what was [97] that transaction and whether Section 439 is applicable, Your Honor has to go one step beyond that to see what the nature of the transaction was, and that transaction was, as indicated by the documents I have here which are from the exhibit file in that state court action, *Quittner vs. White*, the same notes that I have been speaking of, the \$30,000.00 note, the \$5,000.00 note, and the \$25,000.00 note. That was the transaction and that is exactly the reason why Mr. White should in that action have filed a counterclaim against Mr. Herd for his claim arising under the \$30,000.00 note. His failure to do so comes within the meaning of Section 439.

The Referee: All right, now you get down to the law on the matter here. A files a suit against B alleging an existing or a dissolved partnership and praying for an accounting from B as to the transactions of that partnership. Now, as I understand it, that was the complaint here. At the time the action is filed or at the time of the trial A is indebted to B. You maintain that B must set forth that indebtedness in an answer or counterclaim or cross-complaint; is that right?

Mr. Wellins: Where the indebtedness arises out of that same transaction, as it did here.

The Referee: If it arises out of the partnership——

Mr. Wellins: Yes—out of the transaction as such, without regard to how it is carried, Your Honor.

The Referee: No, the transaction is the alleged partnership, [98] counsel.

Mr. Wellins: No.

The Referee: Well, all right, what you better do now is make your offer of proof of what evidence you wish to offer.

Mr. Wellins: Yes, Your Honor.

The Referee: All right, go ahead.

Mr. Wellins: I think Mr. Weber is more familiar with the documents. I wonder if he may do that?

The Referee: All right, let Mr. Weber do it then.

Mr. Weber: I offer in evidence a promissory note dated May 19, 1947, executed by Joseph G. White to George L. Gibbons, in the sum of \$5,000.00—payable to George L. Gibbons, in the sum of \$5,000.00.

Mr. Howard: We are familiar with them.

Mr. Weber: Previously marked Plaintiff's Exhibit No. 13 on March 15, 1949, in the action entitled Quittner vs. White in the Superior Court of Los Angeles County.

Mr. Howard: Is that a complete offer of proof of these documents?

Mr. Weber: No.

Mr. Howard: I have an objection to all of them which I would rather make at one time.

Mr. Weber: I offer to prove further this was received in evidence in the action last referred to by me and was the subject of testimony in that action. [99]

The Referee: Well, I think we have got a rather complicated situation here. Perhaps counsel for Mr. White may want to have this note in evidence here in support of their claim they make here but perhaps also in support of the Trustee's fourth separate and distinct defense they maintain that it is not admissible.

Mr. Horowitz: No. For the purposes of this trial, if your Honor please, we can't see how the admission in evidence of these notes can possibly be detrimental, and for whatever they are worth we would be willing to stipulate that they may be used in evidence.

The Referee: Very well. However, without waiving your right——

Mr. Horowitz: Without waiving our rights. So by stipulation we will jointly offer then this \$5,000.00 note which was described by Mr. Weber fully to your Honor and in the record.

Mr. Weber: And is the same stipulation offered with respect to the promissory note dated May 19, 1947, executed by Al Herd to Joseph G. White in the sum of \$30,000.00, which was marked Plaintiff's Exhibit 29 on April 4, 1949, in the action entitled Quittner vs. White?

Mr. Horowitz: Now, this is one of the exhibits——

Mr. Weber: Yes.

Mr. Horowitz: This is an exhibit in the Superior Court and we must not take it but we will have photostatic copies [100] submitted for this record.

The Referee: Let's take one thing at a time. The photostat of the \$5,000.00 note will be Trustee's Exhibit 15. The record shows that it is received by stipulation.

Mr. Weber: May we have leave to substitute a photostatic copy of it? This is an exhibit also in the other action.

The Referee: This isn't an exhibit.

Mr. Weber: Yes, that is an exhibit.

Mr. Horowitz: By stipulation we permitted the photostat to be filed in lieu of the original.

Mr. Howard: The original is in still another action as an exhibit.

Mr. Horowitz: That is a photostat of the original and the photostat was used in the Quittner vs. White suit. Now we would like to use a photostat of the photostat in the present proceeding.

The Referee: Well, all right. Then will it be understood that these instruments that you are agreed upon may be photostated and as and when they reach this Referee they will be marked as Trustee's Exhibits next in order?

Mr. Horowitz: Yes. Now, the next one will be the \$30,000.00 note dated May 19, 1947, in favor of Joe White, executed by Al Herd, which was Plaintiff's Exhibit 29 in case No. 542,157; and thirdly—this is also a photostat—and thirdly, the promissory note of Joe White and his wife, Marcella White, in favor of the Morris Plan Bank of [101] California, a corporation, dated May 21, 1947, in the sum



of \$25,000.00, which note was Plaintiff's Exhibit No. 1 in the Superior Court action No. 542,157.

Mr. Weber: And is it further stipulated that each of these instruments was the subject of testimony in the action entitled Quittner vs. White detailing the nature of the transaction which led to the execution of each of these documents?

Mr. Horowitz: Well, we can't stipulate as to what the testimony was. We will stipulate there was testimony with respect to the execution of these notes as there was testimony with respect to many, many other subjects.

The Referee: All right; proceed.

Mr. Weber: Is it further stipulated that each of these instruments was the same instrument referred to in the Amended Answer in this proceeding?

Mr. Horowitz: Yes, and that they were instruments offered in evidence by you for the purpose of trying to show that there was a partnership existing between Mr. White and Mr. Herd.

Mr. Weber: We offer to prove—we accept the stipulation that has been made of record up to now. We offer to prove further that the testimony in the Superior Court action related to the nature of each of these transactions, the testimony being given by witnesses in respect to their origin, purpose, and nature; and that the claims asserted by the [102] respondent White in his Amended Answer in these proceedings were the very claims which were the subject of testimony, both oral and documentary, in the Superior Court action.



We offer further to prove that the evidence in the Superior Court action in substance and effect was as follows: That the promissory note dated May 19, 1947, executed by White to Gibbons, was delivered to Mr. Gibbons in consideration in part of Gibbons lifting an attachment that had been levied upon the property of Al Herd, and that this promissory note was given to Gibbons in respect to the lifting of said attachment and the surrender or delivery of certain registration or pink slips pertaining to certain motor vehicles, and that in consideration therefor Gibbons credited the account of Al Herd to the extent of \$5,000.00, representing the principal amount of this promissory note.

Mr. Horowitz: To which general offer of proof we will object on the ground that it is incompetent, irrelevant and immaterial.

The Referee: Well, gentlemen, I don't think we will spend much time on arguing this question. As I read this section of the Code of Civil Procedure on which the Trustee and his counsel here rely, the cross-complaint or counter-claim or the affirmative answer must be filed upon something that is contained in the pleadings, in the complaint or the amended complaint if there be one, and is not required because of something that may develop in the evidence. If that [103] were true, why, you might have to stop the trial of a case right in the middle and say, "Here, now, wait a minute, I have got to get a cross-complaint in here because of what has developed in here."

So I'm going to sustain the objection.

Mr. Weber: Would the Court desire to hear argument on that point?

The Referee: No, I think it is clear, so I will sustain the objection.

Mr. Wellins: Your Honor, in Paragraph X of the complaint which your Honor read a moment ago, Sub-paragraph C, the plaintiff in the Quittner vs. White action alleged among other things that the defendant White was to pay to creditors of the bankrupt, for and on account of debts, theretofore incurred by the bankrupt, the sum of \$35,000.00, and that is the transaction about which the \$5,000.00 note refers—I don't mean "about which," I mean to which the transaction relating to the \$5,000.00 note refers, and the \$25,000.00 note, and that fits in exactly to the transaction alleged in the complaint; and Mr. White came back and said, "Yes, I gave the \$5,000.00 note to Mr. Gibbons and I gave the \$25,000.00 note to the Morris Plan Bank and I spent some other incidental monies in addition, but Mr. Herd gave me the \$30,000.00 note"; and that is the other note that Mr.——

The Referee: What paragraph of the Complaint did you mention? [104]

Mr. Wellins: X, your Honor. That is the transaction there alleged.

The Referee: Well, that is part of the agreement of partnership. You have got that right in with the agreement of partnership. Now, there is one isolated paragraph of your complaint that might give us some trouble, and that is Paragraph XX, that between the making of the partnership agreement and the filing of the petition in bankruptcy,

the bankrupt personally paid to the partnership employees some sum of money that Mr. White in your prayer was asked to contribute thereto. But even that is tied in with the partnership.

No, I don't see how you can make anything out of the Quittner vs. White suit except a partnership accounting suit.

Mr. Howard: Furthermore, if the Court please, the transaction upon which our claim here is based is the transaction between the Trustee and Gibbons and the manner of prosecuting the Gibbons action by the Trustee, a wholly separate transaction from both the \$5,000.00 note and the \$30,000.00 note and the partnership. Our claim here is on a third transaction even they admit.

The Referee: All right.

Mr. Wellins: Your Honor, the Trustee alleged transactions and the Trustee characterized them as a partnership. The court found the transactions took place with regard to [105] the notes but found that they did not amount as a matter of law to a partnership. However, we are not concerned with proving to your Honor that there was a partnership. That is not what Section 439 means or requires. Section 439 merely says that if it is part of that transaction then the defendant is obliged to file a counterclaim, if he has any. It does not matter what legal conclusion the Trustee ascribed to the facts related there. It is the transaction that is important, and the transaction here involved is the very one on which Mr. White now bases his claim.

The Referee: All right, but, counsel, every man is entitled to his day in Court and he should not be

denied his day in Court upon a sheer technicality, and therefore provisions of the law like Section 439 must be strictly construed. You have got to bring yourself absolutely within the section before you can deprive a man of his opportunity to be heard on what he claims is a cause of action.

Mr. Wellins: Your Honor, Mr. White had three weeks in Court——

The Referee: No, no more argument, sir. Objection sustained.

Mr. Wellins: I would like to complete our offer of proof then in order to have the record complete in that respect.

The Referee: All right, anything further you want to put in the record by way of an offer of proof? [106]

Mr. Wellins: Yes. We will offer to prove that on May 21, 1947, Joseph G. White and Marcella White executed a promissory note in the sum of \$25,000.00 to the Morris Plan Bank of California, a corporation.

The Referee: Let me stop you a minute. You have already stipulated that that may go into evidence. Isn't that right?

Mr. Horowitz: Certainly.

The Referee: All right.

Mr. Wellins: We further offer to prove that the \$25,000.00 note was the note involved in the transaction referred to in the Complaint, and that it is a portion of the \$35,000.00 referred to in Paragraph X-C of the Complaint which Mr. White advanced at that time, Mr. White having executed and delivered this \$25,000.00 note at that time.

We further offer to prove that Mr. White's testimony and Mr. Herd's testimony and the testimony of several other witnesses at the trial of Quittner vs. White all related to this transaction and the manner of the events leading up to the execution and delivery of this note by Mr. White and his wife to the Morris Plan Bank, who were creditors of Mr. Herd and who had levied an attachment on Mr. Herd theretofore and who released the attachment in consideration of Mr. White's execution and delivery of this \$25,000.00 note, and thereby permitted the automobile business of Mr. Herd to continue to operate.

Mr. Howard: To which we object, if the Court please, [107] on the ground it is incompetent, irrelevant and immaterial in that the evidence given in the trial cannot be relevant to the question of what transaction is set forth in the Complaint as the foundation of the plaintiff's claim therein.

The Referee: Objection sustained. Anything further?

Mr. Wellins: We further offer to prove, your Honor, that on or about May 19, 1947, Al Herd, who is the bankrupt herein, executed and delivered to——

The Referee: That note is going into evidence, isn't it, counsel?

Mr. Horowitz: That is already in evidence.

Mr. Howard: We have stipulated to the execution of the note.

Mr. Horowitz: I think if there are any more offers we should have them complete once and for all.



Mr. Wellins: Well, we will try to, Mr. Horowitz.

The Referee: All right, go ahead.

Mr. Wellins: We offer to prove that the \$30,000.00 note of May 19, 1947, executed by Al Herd and made payable to Joe White, to the order of Joe White, was delivered to Joe White on or about that date in consideration for and as part of the transaction relating to the \$5,000.00 note that Mr. White had therefore given Mr. Gibbons and the \$25,000.00 note Mr. White executed and delivered to the Morris Plan Bank, which notes were given in order to lift attachments and permit the business of Al Herd to continue to operate. [108]

Mr. Howard: To which we object, if the Court please—had you finished?

Mr. Wellins: I should add one more sentence, and that this is part of the transaction alleged in the complaint on the basis of which a partnership accounting was requested in the case of Quittner vs. White.

Mr. Howard: If the Court please, we object on the ground that it is incompetent, irrelevant and immaterial in connection with this matter in that this offer does not prove a transaction which is the basis of the plaintiff's Complaint in the accounting action.

The Referee: The objection is sustained. Any further offer of proof?

Mr. Wellins: If the Court please, at this time we offer by reference the transcript of the testimony of Joseph G. White on 21-A examination, hereto-



fore taken in this Court in the within bankruptcy.

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Referee: Sustained. Let the record show that all of this now pertains only to the fourth separate and distinct defense. We are trying to dispose of that.

Mr. Wellins: We further offer to prove, your Honor, that Mr. Joseph G. White testified in the case of Quittner vs. White that the transaction between Mr. Herd and himself about which that complaint was filed was in reality one in [109] which he had loaned money to Mr. Herd and by way of writing, the \$5,000.00 note of which we have just spoken, and the \$25,000.00 note, and that Mr. Herd in consideration of that gave Mr. White the \$30,000.00 note about which we have also just spoken, and that that was the substance of Mr. White's claim on the transaction as alleged in the Complaint of Quittner vs. White.

Mr. Horowitz: To which we object as incompetent, irrelevant and immaterial.

The Referee: Sustained, and I'm not going to extend this record unduly, Mr. Wellins. I shall make a ruling that any of the testimony in the case of Quittner vs. White is incompetent, irrelevant and immaterial here as to this fourth separate defense. So let's have no further offers of proof along that line.

Mr. Wellins: Do I understand by the Court's ruling that you wish no further offers of proof—

The Referee: As to the testimony given in the case.

Mr. Wellins (Continuing): ——to explain the transaction alleged in the complaint? The only reason I am making these offers of proof is because I am trying to explain——

The Referee: Yes, I will make that ruling. We have the Complaint in evidence. It doesn't need any explanation.

Mr. Wellins: Very well, if that is the Court's ruling we will make no further offers of proof, but we do take the [110] position it does need explaining.

The Referee: All right, I can't go along with you on that.

All right, gentlemen, that seems to be all——

Mr. Wellins: I wonder if we can make a request to the Court about the order of proof? I have brought to the Court a number of books I will have to return tonight, pertaining to another separate and distinct defense, and I wonder if we could go to that one.

The Referee: Just a minute. The fourth separate and distinct defense is not well taken.

Now which one do you want to take?

Mr. Wellins: The last one, your Honor.

The Referee: And that is which one now?

Mr. Wellins: The fifteenth, your Honor.

The Referee: Have we that far to go? All right, the fifteenth separate and distinct defense:

“That the respondent White is barred from asserting or recovering on his alleged claim herein

by reason of the provisions of Sections 68 and 57(g) of the Bankruptcy Act; that the alleged claim of respondent White is not a mutual debt or credit between the estate of the bankrupt herein and the said White; that the alleged claim of the respondent White is not provable against the estate of the bankrupt herein; and that said claim is not allowable against the estate of the bankrupt herein under and by virtue of the [111] aforesaid provisions of the Bankruptcy Act."

Well, let's see. What is 57(g)? What is that about?

Mr. Wellins: That has to do with the allowability of debts that are unliquidated and are liquidated through the Bankruptcy Court.

The Referee: There is nothing unliquidated about this.

Mr. Wellins: Yes, your Honor. This claim, if there is any claim, arises under this \$30,000.00 note that Herd gave Mr. White, and he also received certain other security by way of assignments of reserves, and \$5,000.00 of it is evidenced by the amount—or a little over \$5,000.00 would be the amount that Mr. White would claim; but I prefer if we might to discuss the matter commencing with the words of Section 68 in order to make our position a little more intelligible.

The Referee: No, I don't think that we will spend much time on this one because this is rather a peculiar situation where Mr. White is contending among other things that this note is not actionable against him in the hands either of Mr. Herd or

of the Trustee in Bankruptcy. Isn't that one of your positions, gentlemen?

Mr. Howard: That is right, if the Court please.

The Referee: So the usual rules of set-off don't help us in that situation. And then they also maintain that they do have the right of set-off. No, this relates so closely to the very case that I don't think we will spend any time [112] on this this afternoon, or at least not at this moment, but we will go into these questions when we get into the main case. Why I'm going through these affirmative defenses here is to see if I can find one here that will make it unnecessary for us to hear the case in chief. If you have got some defense of estoppel or something like that, perhaps that will dispose of the entire case. But your fifteenth separate and distinct defense goes right to the heart of the whole case.

Mr. Wellins: We will defer the argument on that one then.

The Referee: Yes, we will hold that up. I'm sorry about your books.

Mr. Wellins: I will bring them back another time.

The Referee: All right. The next will be the fifth. On July 15, 1948, Mr. Wellins and Mr. Weber, as attorneys for plaintiff George L. Gibbons in said promissory note action, filed a motion for summary judgment, which motion was noticed for hearing in Department 35 of said Court on July 26, 1948. Said motion was thereafter continued to August 16, 1948.

I assume it is true, the allegation so far; is that correct?

Mr. Howard: Yes.

The Referee: "Prior to August 16, 1948, respondent White and his attorneys in said promissory note action knew that any and all proceeds which might be recovered in said [113] action would inure and belong to, and had been assigned by Gibbons, to the Trustee in Bankruptcy herein."

Well, that is denied.

Mr. Howard: Yes.

The Referee: "On or about August 13, 1948, with knowledge of the foregoing facts, Messrs. Horowitz & Howard, attorneys for the defendant in said proceeding (respondent White), served an amended answer to the complaint in said action wherein they failed to assert or make any defense, offset, counterclaim or cross-complaint in connection with the matters hereinbefore alleged, or any of the matters alleged in the amended answer filed in this proceeding by respondent White."

I imagine that is true, gentlemen, isn't it?

Mr. Howard: That is true, your Honor.

The Referee: Paragraph V, on or about August 16, 1948, said motion for summary judgment duly came on for hearing before said Superior Court, and said motion was thereupon argued by Alvin F. Howard.

That is true?

Mr. Howard: Yes.

The Referee: Paragraph VI:

"Plaintiff's motion for summary judgment was thereupon granted and judgment was thereafter entered in said action on August 25, 1948, pursuant



to the order of said Court granting said motion for summary judgment." [114]

Mr. Howard: That is true.

The Referee: Paragraph VII, pursuant to the request of Messrs. Horowitz & Howard, attorneys for the defendant in said action, said Superior Court granted a 20-day stay of execution.

That is true?

Mr. Howard: That is true.

The Referee: Paragraph VIII:

"At no time prior to the payment and satisfaction of said judgment as aforesaid did the defendant in said action, or did his attorneys, assert any claim, counterclaim, defense or offset, or initiate any motion, proceeding or action in connection with the matters hereinbefore alleged, or the matters alleged in the respondent's amended answer in this proceeding."

That is true?

Mr. Howard: Yes, that is true.

The Referee: Paragraph IX:

"By reason of the premises, the respondent is precluded and estopped from asserting all or any of the matters alleged in his amended answer herein."

Well, that is just about the same as we have already been going over. There is no further evidence is there, counsel?

Mr. Wellins: No, there is no——

The Referee: Except the two lawyers that are not here? [115]

Mr. Wellins: Except the two lawyers that are



not here, that is right. There is a considerable amount of legal argument that the Trustee would like to make on that subject, however, in view of the testimony as it is already admitted without controversy by both sides.

The Referee: No. The Court rules that the fifth separate and distinct defense is not well taken.

Now we come to the sixth, on or about May 3, 1948, the Trustee filed a verified petition with the Referee in Bankruptcy for leave to compromise the aforesaid suit theretofore brought by the Trustee against Gibbons.

Well, I take it that that may be admitted, the first part of it? That is, the first paragraph there?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph II, in addition thereto the proposed written settlement offer made by Gibbons to the Trustee was attached to said petition as Exhibit A thereof, which settlement offer reads in part as follows:

I assume that will be conceded.

Mr. Howard: Yes, if your Honor please.

The Referee: Paragraph III:

“Pursuant to the prayer of said petition, a notice of hearing was thereupon sent by the office of the Referee to all listed or known creditors of the bankrupt, which notice was dated May 6, 1948. Said notice set forth, among other things, the terms of said offer of settlement,” etc. [116]

I assume that may be admitted?

Mr. Howard: If it can be stipulated that Mr. White was not one of the known creditors who re-

ceived that notice.

The Referee: No, that doesn't say he was one. That may be a matter of defense.

Mr. Howard: All right.

The Referee: It was sent to all listed or known—well, no, I don't think that word "known" is good in there. We don't do that. The Referee sends notices to the creditors appearing in the schedules, creditors appearing on claims, and creditors who have asked for notices, or for that matter whether a person is a creditor or not, any person who has asked for copies of notices.

Mr. Wellins: We will stipulate that it may be understood that the notice went only to those persons described in the last statement of your Honor.

Mr. Howard: Not to the respondent?

The Referee: Well, I don't know. I don't know whether his name is in there or not.

Mr. Horowitz: No, that is all right.

The Referee: That is without prejudice to your showing that he was not a listed creditor or had not filed a claim or had not requested a notice.

Mr. Howard: With that understanding that is all right.

The Referee: All right, on May 19, 1948, said petition to compromise the Trustee's action against Gibbons came on [117] for hearing and the petition was thereupon granted without opposition.

Any question about that?

Mr. Horowitz: Not a bit.

The Referee: Paragraph V, on May 25, 1948, an order was entered by the Referee in Bankruptcy

herein confirming said compromise, which order reads in part as follows:

Is that conceded?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph VI:

“Pursuant to said order confirming said compromise, Gibbons executed an assignment to the Trustee, dated ‘June . . , 1948,’ of all his right, title and interest in and to any recovery in his then pending action against White upon said promissory note.”

Now, do you gentlemen concede that?

Mr. Howard: Yes, if the Court please.

The Referee: All right, Paragraph VII:

“Thereafter, and on or about June 16, 1948, the Trustee filed his petition with the Referee in Bankruptcy herein, for an order authorizing Messrs. Wellins and Weber to substitute themselves in the place and stead of the law firm of Jones & Wiener.”

Any question about that?

Mr. Howard: No, if the Court please.

The Referee: Paragraph VIII, on or about June 16, 1948, [118] an order was entered by the Referee in Bankruptcy herein authorizing said substitution.

Any question there?

Mr. Howard: No.

The Referee: Paragraph IX, thereafter, and pursuant to said order authorizing such substitution of attorneys, a copy of the substitution of attorneys was served.

Is that admitted?

Mr. Howard: Yes, if the Court please.

The Referee: All of that Paragraph IX?

Mr. Howard: Yes.

The Referee: Paragraph X:

“At all times herein mentioned, respondent White and his attorneys in said action knew of the pendency of these bankruptcy proceedings and that Messrs. Wellins and Weber, the successor attorneys for the plaintiff in said promissory note action were also the attorneys for the Trustee in Bankruptcy herein.”

What about that one? There is some question on that one, isn't there?

Mr. Horowitz: Yes. The question is—we knew as I testified that Weber and Wellins were attorneys for the Trustee in Bankruptcy and we knew after we got notice of the substitution that Messrs. Weber and Wellins were attorneys for Gibbons; but at all times mentioned here that we knew both items, that we cannot admit. [119]

The Referee: All right. Paragraph XI:

“The respondent and his attorneys were negligent in failing to examine the files and records of the Referee in Bankruptcy herein, which examination, in the exercise of reasonable diligence, should have been made.”

Well, you won't agree to that, of course?

Mr. Howard: That is denied.

The Referee: Nor will you agree to No. 12 which, of course, is simply a conclusion that if an examination had been made it would have disclosed what was in the file—well, that is true. Anybody that had

examined the file would have found what was in it.

Mr. Howard: Yes.

The Referee: Paragraph XIII:

“By reason of the foregoing, the respondent is estopped and precluded from asserting, maintaining or claiming his ignorance of the Trustee’s interest in the recovery in said promissory note action, and all or any of the matters alleged in his amended answer herein.”

Well, now, I suppose the only evidence that either of you may want in connection with that is whether or not the respondent White was among those who got the notice or to whom a notice was sent. What do you want to do about that?

Mr. Weber: Before we proceed with that, I have been wondering if I should move to amend this defense by including an allegation concerning the filing of the stipulation by [120] Mr. Gibbons withdrawing his claim in bankruptcy? That has been previously marked as an exhibit in evidence but that contains recitals which I would like to include in this defense.

The Referee: Well, you may have leave to supplement this by such a recital if you like.

Mr. Howard: Filed, as I understand it, in the bankruptcy proceeding?

Mr. Weber: That is right.

The Referee: Send counsel a copy of whatever you send in.

Now, counsel for Mr. White, what do you want to do about the question of any proof on the question



of whether or not Mr. White was one of those who received the notice?

Mr. Horowitz: Well, the records of the Bankruptcy Court disclose that Mr. White was not among those who received a notice.

The Referee: What do you say, gentlemen?

Mr. Wellins: So far as I know that is correct.

The Referee: He did not receive a notice?

Mr. Wellins: He did not receive a written notice.

Mr. Weber: That is, the files do not show that Mr. White received written notice.

The Referee: All right.

Mr. Horowitz: Then the question is whether or not from the evidence we were guilty of negligence in not looking to [121] see whether or not the representations that were made to us were true or false.

Mr. Weber: That is a false statement. There were no representations made, and I would like Mr. Horowitz to point out to me the representations that were made.

The Referee: Well, I think that is immaterial now. The whole sum and substance of this defense then is that Mr. White and his attorneys made no effort—that they should have come over here and looked at this file and if they had come over here they would have found an assignment of the proceeds of the recovery.

Mr. Weber: May I give the Court two citations on that point which may be of interest?

The Referee: I would be interested.

Mr. Weber: *Hildreth vs. James*, 109 California 301.

The Referee: What does that hold?

Mr. Weber: That was an action to set aside a judgment and quiet title, and several years after the entry of judgment they brought an action to set it aside, and the Court said:

“In the complaint no facts are averred showing any diligence on the part of appellants, at the time of the pending of said action of *Kate D. McLaughlin vs. Laura J. Hildreth, et al.*, to discover what they now allege to have been a defense to said action.”

They claimed certain fraud had been committed incident [122] to the first transaction in that a deed that was absolute on its face was in fact a mortgage, and they held that the concealment of that fact was a defect in the former action that was a justification or basis for setting aside the former judgment because they did not know that the deed that was absolute on its face was in fact a mortgage; and the Court said——

The Referee: I'm not interested in the case. What other citation do you have?

Mr. Weber: Well, I think the Court would find this language also quite pertinent if I may quote it. It is rather short:

“If this be true there was a public record at the time of said action which would have been evidence of the fact claimed to have been concealed. We think that the averments of the complaint are totally insufficient to warrant a decree setting aside a solemn judgment of the court of record, especially after it has stood for so long a period unchallenged.”

The Referee: I'm sorry, sir. I don't want any argument.

Mr. Weber: It would appear clearly——

The Referee: I don't want any argument.

Mr. Weber: We do not pretend these citations are exhaustive. There are many others. Hecht vs. Slaney, 72 California 363. [123]

The Referee: No, I don't think those cases at all approach our situation here. I do not quarrel with the cases as setting forth the law in the particular situations therein involved but I think our situation is quite different.

All right, which one is this now?

Mr. Howard: No. 6.

The Referee: The 6th separate and distinct defense is not well taken.

The seventh separate and distinct defense:

“Under and by virtue of Section 385 of the Code of Civil Procedure of the State of California, the plaintiff in said action, to wit, George L. Gibbons, was the proper party to maintain and continue said action, and to prosecute the same as plaintiff, and was at all times the real party in interest therein.”

Well, I will make a finding at this time that that is not true. Gibbons was not the real party in interest at all times after this Court approved the compromise between the Trustee and Gibbons and Gibbons consummated that compromise.

So the seventh separate and distinct defense is not well taken.

Mr. Wellins: I presume that your Honor does not wish to have any oral argument or citation of

authorities on that subject at this time, although we do have some authorities to present to your Honor in addition to those cited in our [124] memorandum.

The Referee: All right. I don't want anything further at this time.

The eighth separate and distinct defense:

"At no time has the respondent ever filed a claim against the bankrupt in these bankruptcy proceedings, and that the time for the filing of creditor's claims herein has expired."

So stipulated, gentlemen?

Mr. Howard: Yes, if the Court please.

The Referee: Paragraph II:

"By reason thereof, the claims set forth in the respondent's amended answer are not maintainable against the Trustee in Bankruptcy."

All right, the eighth separate and distinct defense is not well taken.

The ninth separate and distinct defense:

"The Trustee incorporates herein by reference each and every allegation contained in paragraphs I to XII inclusive of the sixth separate and distinct defense, and paragraph I of the eighth separate and distinct defense herein set forth.

"By reason of the premises, respondent White is estopped and precluded from asserting or claiming ignorance of the Trustee's interest in and to the proceeds of said recovery, or of any of the facts herein set forth, of which he would have had notice if his alleged claim had been filed in the [125] above bankruptcy proceedings; and from charging or im-

puting to the Trustee any breach of duty in allegedly failing to notify the respondent independently of the foregoing matters spread upon the records of this Court, and of which all creditors whose claims were duly filed had notice.”

Well, the 9th separate and distinct defense is not well taken.

The tenth separate and distinct defense:

“There is a defect of parties in this proceeding in that the plaintiff and judgment debtor in said promissory note action, to wit, George L. Gibbons, is not a party to this proceeding, and that he resides outside the jurisdiction of this Court, to wit, in the State of Arizona.”

Well, do you say Mr. Gibbons is a necessary party here?

Mr. Wellins: Yes.

The Referee: Why?

Mr. Wellins: In the first place, your Honor, he is the judgment creditor. In the second place, the effect of the proceeding here involved is to collaterally attack and destroyed the effect of that judgment. In the third place, there are allegations in the Amended Answer to the order to show cause that Mr. Weber and I were purporting to represent Mr. Gibbons as his attorney but were in fact not representing him as his attorney, and therefore his status as a client and the employment of one or more persons, including Mr. Weber and myself, is necessarily in issue. [126]

Now, the only thing in evidence here is his signed substitution of attorneys and his erstwhile attor-



neys' consent to that substitution and our undertaking to accept it, along with the approval of the Court on petition and order. If this Court were to hear this matter, the effect would be that the finality of the judgment heretofore obtained would be affected and the rights of Mr. Gibbons would be in issue necessarily. Anything that we did in that action we did as his attorneys and also as the attorneys for the Trustee. He would be entitled conceivably to another recovery, among other things, there being—if the claim of Mr. White should prove successful here, and whether or not Mr. White is correct in his assertion that Mr. Quittner should have been substituted as the plaintiff in the case, which of course we submit is incorrect, Mr. Quittner could not have been substituted even if he had made a motion for substitution in that action at that time; but even if that were true, Mr. Gibbons would have to be a party to any action in that situation because until such a substitution is made Mr. Gibbons stands as the party plaintiff.

The Referee: Well, that is all very interesting, Mr. Wellins, but I don't think you ever had in mind you were going to charge Mr. Gibbons anything for your services, did you?

Mr. Wellins: We were not going to make any independent charge to him, and we are not trying in this manner to secure [127] any compensation for our services.

The Referee: No, you simply prosecuted the action in the name of the assignor; isn't that true?

Mr. Wellins: We did exactly what we——

The Referee: As you say, and perhaps properly, under the laws of the state you had a right to do. Isn't that right?

Mr. Wellins: Yes. You mean we made no independent arrangement for compensation with him?

The Referee: That is right.

Mr. Wellins: This action continued in the name of the owner of the cause. The attorney fees were to be taken care of as part of the recovery in the case.

The Referee: As a matter of fact, there was never any discussion about attorney fees between you and Mr. Gibbons, was there?

Mr. Wellins: No, because the attorney fees were discussed in the note. The note provided for that and Mr. Gibbons did not retain that amount. That legitimately went to the Trustee.

The Referee: That is right, and your agreement with Mr. Gibbons was he would give you any kind of an assignment you wanted.

Mr. Wellins: That was not our agreement with Mr. Gibbons.

The Referee: Be careful what you are saying, sir. [128]

Mr. Wellins: Our agreement with Mr. Gibbons is set forth in our petition. Mr. Gibbons made an offer of compromise.

The Referee: His proposal to you then was that he would give you any kind of assignment you wanted?

Mr. Wellins: I wouldn't put it that broadly.

The Referee: He would assign the cause of action or the proceeds of the action?

Mr. Wellins: He offered those two alternatives. He didn't say he would give us any kind of agreement we wanted. As a matter of fact, we negotiated several months on various aspects of the agreement and couldn't get it.

The Referee: But he told you he would give you an assignment of the cause of action or an assignment of the proceeds?

Mr. Wellins: Exactly as it is in the petition.

The Referee: You are not going to try to deceive the Court, are you?

Mr. Wellins: Certainly not, but we have to have a complete statement and that is not the complete statement. We were to get \$3,000.00 and in addition——

The Referee: Wait a minute. You are questioning the Court and I want to get it straight.

Mr. Weber: I would like to express my amazement at the characterization just levelled at my colleague.

The Referee: What was that, Mr. [129] Singeltary?

(Record read.)

The Referee: All right. Here is a copy of Mr. Gibbons' proposal attached to the petition to compromise the Trustee's claim against George L. Gibbons, filed May 3, 1948.

“Without prejudice and without conceding the truth of any of the allegations in the complaint in this action, I hereby offer in full settlement of the above action the sum of \$3,000.00 payable as fol-

lows: the sum of \$1500.00 on or before May 15, 1948, and the sum of \$1500.00 on or before June 15, 1948.

“In addition thereto, I agree to transfer and assign to you all my right, title and interest in and to that certain promissory note heretofore executed by Joseph G. White to me, dated on or about May 19, 1947, in the sum of \$5,000.00, plus interest and attorney’s fees; or in the alternative, all my right, title and interest in and to any recovery by me thereunder. You shall have the right to determine whether or not the assignment shall cover the note or the proceeds of any recovery in the action now pending thereon.”

Mr. Weber: Does that square with deception practiced upon the Court?

The Referee: I’m not going to get into any controversy with you, counsel, as to what the Court said. I will simply say this, that your tenth separate and distinct defense is not well taken and is absolutely without any merit whatsoever. [130]

The eleventh separate and distinct defense:

“That the amended answer of the respondent White is insufficient as a matter of law and fails to state a claim upon which relief can be granted.”

It is the ruling of the court that the eleventh separate and distinct defense is not well taken.

The twelfth separate and distinct defense:

“That the Referee in Bankruptcy has no jurisdiction to grant the relief prayed for by the respondent White.”

Well, counsel, the Trustee filed a petition for an order to show cause requiring Mr. White to assert

any claim that he might have in and to the funds in the hands of the Trustee. How do you say that the Referee has no jurisdiction?

Mr. Wellins: In this way, Your Honor, that here without having had any claim filed, if there was a claim to be asserted, we asked that it be brought out into the open. We had no way of knowing the details of the claim.

Mr. Weber: I happen to be familiar with this feature of it, Your Honor.

Mr. Wellins: I will be glad to yield to Mr. Weber.

Mr. Weber: It is somewhat disconcerting for me to interrupt, and it must be to the Court as well. Mr. Horowitz telephoned Mr. Quittner and told him not to distribute the money available to creditors, and you asked Mr. Quittner what was holding up the distribution and he told you Mr. [131] Horowitz had called him, and you suggested his attorneys file an order to show cause so we could get the ball rolling, and we followed the suggestion of the Court. Now, in citing them in we did not bestow jurisdiction on this court to hear in a summary proceeding the matter of a judgment of another Court of competent jurisdiction. It is still our position that there is no jurisdiction in a Referee in Bankruptcy, nor is there in any other Court, to destroy or nullify a judgment of a court of competent jurisdiction, and that position the Trustee still urges.

The Referee: All right, the 12th separate and distinct defense is not sustained.

Mr. Wellins: There is one additional feature of



that, Your Honor, and that is the possible distinction between a plenary suit and a summary suit. When we were here before that matter was discussed a little bit, and we feel now that the Second Amended Answer is in that the only way that this proceeding can be determined is in a plenary proceeding, and we have authorities to that effect and would be glad to cite them to the Court. We don't believe that anything that the Trustee has done up to this date either confers jurisdiction or waives any right to mention the necessity for plenary jurisdiction in this matter, and I refer Your Honor to our earlier points and authorities which expressly call this matter to the Court's attention.

The Referee: All right, nothing further, gentlemen. [132] The 12th separate and distinct defense is not well taken.

The 13th separate and distinct defense is:

"The Trustee incorporates herein by reference each and every allegation contained in paragraphs I to VI, inclusive, of the first affirmative defense herein.

"That by reason of the premises, respondent White is barred from relief under the provisions of Section 473 C. C. P."

In other words, that he didn't move within six months, but I don't think that is applicable here. The burden of Mr. White's position here is simply that he did not know at the time of the judgment against him that the Trustee was the owner of the cause of action. He therefore was deprived of the opportunity of presenting the defenses that he now

asserts. I don't think that is governed by Section 473.

Mr. Howard: If the Court please, there are cases which we can cite which hold that the remedy urged here by Mr. White is cumulative with 473, and that if indeed he had proceeded under Section 473 and been denied relief, he nonetheless could have proceeded as he is proceeding here.

The Referee: I don't think we can take any time on that. The thirteenth separate and distinct defense is not well taken.

Mr. Wellins: Your Honor——

The Referee: What do you want to say?

Mr. Wellins: Well, I feel we are talking after the [133] matter has been decided. I would like to state our position in one sentence, but I feel I am almost out of breath trying to get a sentence in before the matter is decided, but I do have decisions on this matter if you want them. If you don't want me to say anything I will just save my breath, but I have cases in the Supreme Court that the Federal rules under Section 68 do not enlarge the state law but are merely further limitations on whatever the state law provides; and the burden would be on Mr. White to show more than six months elapsed without him taking the occasion to read the Federal files in bankruptcy, assuming that he had no other source of knowledge or information, and I do not believe that he has either sustained that burden of proof or that as a matter of law the particular affirmative defense can be ruled on independently of such proof.

The Referee: All right, the 13th separate and distinct defense is not well taken.

The 14th separate and distinct defense:

“That the respondent White has delayed unreasonably in presenting and filing his alleged claim herein, and by reason thereof that the respondent White is barred by laches from asserting the same.”

I suppose it may be stipulated that the Trustee in bankruptcy still has funds in his possession which have not been distributed?

Mr. Wellins: It may be so stipulated, Your Honor. [134]

The Referee: And obviously this Court is not going to grant Mr. White any relief, if it grants him any at all, which would require the Trustee to get back any money which he may have disbursed; and also the relief if it is granted, if any is granted, could be given only as to such monies as there remain in the hands of the Trustee after such expenses as the Court might fix were satisfied and paid. I mean we can't go back now and deprive people of money they have earned merely because of this particular situation.

Mr. Horowitz: That is correct.

The Referee: So, for instance, if I should decide Mr. White ought to have \$6,000.00, if I couldn't find \$6,000.00 in the hands of the Trustee after I had paid other things that I felt ought to be paid, then it would have to be reduced accordingly.

Mr. Horowitz: That is right.

The Referee: So with that in view I don't think that the plea of laches could be asserted here.

All right, the 14th separate and distinct defense is not well taken.

As far as the 15th is concerned, I think we will just take that along with the case in chief and see what should be done with that. There is no use trying to make a separate ruling on that because I do think that goes right to the very heart of our problem here.

Mr. Wellins: Does Your Honor think or feel that the [135] question of mutuality can be isolated from the heart of the problem? I mean by that the fact that Mr. Quittner, the Trustee, obtained the money, without talking about the legal questions, but he obtained the money by virtue of a compromise with Mr. Gibbons, and the right through which he obtained that was Mr. Gibbons' right to which he succeeded. The right which Mr. White claims here, without regard to whether he can establish it, is a right he has arising under the \$30,000.00 note and the claim of accommodation maker of the \$5,000.00 note. Now, that is a right, if it exists, between Mr. White and Mr. Herd. Now, the Courts have said, and that is the reason I brought these cases here, that the determination of whether or not Mr. White could, for example, urge his claim here is whether or not these debts and credits are mutual, and to be mutual they must arise, to use the words of the Courts, in the same right; and I believe on the face of the facts admitted here, it is concerning parties between whom these rights, if they existed, they did not arise in the same right, and I have some authorities on that.

The Referee: That may well be, and that is why I am not going to rule on the 15th separate defense, but I do say I think it is so closely associated to the main problem that we will just take it along in stride with the main part of the case.

Mr. Wellins: Very well, Your Honor. [136]

The Referee: We won't make a separate ruling on it at this time.

Now, gentlemen, it is 4:40 and I don't think I should impose on you further. We have disposed of everything now except what I regard as the heart of the case, and I don't know as we need a great deal of evidence further except maybe on the question of whether or not this is in fact an accommodation note. I'm not going to try the partnership issue again but simply whether or not Mr. White did receive any consideration, not that he was made a member of a partnership or anything like that. That has been settled. He was not a partner.

Mr. Horowitz: I think I can state the facts.

The Referee: Well, let's not take any time now. I think that was just a sort of a survey of what we have left to do because we can't finish tonight anyway.

(Discussion off the record as to a continuance.)

The Referee: All right, let's take an adjournment now until Tuesday, January 31, at 10:00 o'clock.

(Whereupon an adjournment was taken until Tuesday, January 31, 1950, at 10:00 o'clock a.m.) [137]



Certificate

I, H. A. Singeltary, hereby certify that on the 27th day of January, 1950, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Benno M. Brink, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 30th day of January, 1950.

/s/ H. A. SINGELTARY,  
Official Court Reporter.

[Endorsed]: Filed January 31, 1950. [138]

January 31, 1950, 10 A.M.

The Referee: Al Herd.

Mr. Weber: Ready.

The Referee: All right, you may proceed, Mr. Horowitz.

Mr. Wellins: We have served this morning an amended reply to the answer of the respondent White here, your Honor, and we ask leave to file that at this time.

The Referee: Let me see it, please.

Mr. Horowitz: To which we object on the ground, if your Honor please, that there are no

matters stated in the amendment which are proper defenses. I take it that there is no opportunity for demurrer to them, but they will show that they are not proper defenses at all.

The Referee: All right, will you be seated a moment, Mr. White?

As to the proposed amendment, the first portion of it is a request that there be added something to the Sixth Separate and Distinct Defense which appears to be more by way of evidence than a pleading, namely, that on or about July 14th a written stipulation was filed in the above bankruptcy proceeding by said George L. Gibbons, which written stipulation reads in part as follows:

“Whereas, by order of the Referee the Trustee is authorized to settle and compromise the action heretofore brought by said Trustee against Gibbons upon payment by said Gibbons to the Trustee of the sum of \$3,000.00, and upon execution by said Gibbons of an assignment to the said Trustee [2] of all his right, title and interest in and to any recovery by said Gibbons in an action now pending in the Superior Court of Los Angeles County.”

Well, counsel, as far as I have read it doesn't make sense. There is no termination to it. It simply is a “whereas.” Now, what do you want to accomplish by this amendment?

Mr. Wellins: Because of the notice this gave to all the world as a public record, a part of this bankruptcy proceedings, and a record of that transaction there between the Trustee and Gibbons, and the reading of the file—this is only the additional facts

which the reading of the file would have disclosed.

The Referee: Well, counsel, your objection is that the amendments do not constitute or do not state grounds of defense. It is rather difficult for me to rule on that without giving thorough consideration to all of the allegations here. So if that is the only objection you will have to make I don't see how I can intelligently rule on it without studying all the defenses. What I thought you were going to do, I thought you were going to object upon the ground it was too late to make any amendments.

Mr. Horowitz: Well, we do that also. As I understand it, we have disposed of the first 14 of the defenses and we have left for consideration the 15th defense which we are going to dispose of today, I suppose. [3]

The Referee: If counsel for the respondent here is willing to stipulate that the allegation of the proposed paragraph 9-a of the Sixth Defense is true——

Mr. Horowitz: We will stipulate that that is true, your Honor.

The Referee: Then the motion for leave to file an amendment is denied.

Mr. Wellins: Well, we will accept the stipulation insofar as it goes and request the Court that in order that that section of the stipulation may be understood in the record that the document be filed.

The Referee: Isn't it already in evidence?

Mr. Wellins: The stipulation was that the substance of a certain paragraph is true.

The Referee: I mean isn't this document in evidence?

Mr. Wellins: No; that is the original, your Honor.

The Referee: Any objection to the entire instrument being received in evidence?

Mr. Horowitz: Yes.

The Referee: I mean the instrument filed on or about July 14, 1948?

Mr. Horowitz: No, there is no objection to that.

The Referee: All right, your motion for leave to amend is denied. I shall mark this as an exhibit as soon as I get the file.

So now we are taking up the case on its merits, the [4] petition or rather, the answer of the respondent here.

Mr. Wellins: Did I understand that your Honor marked the original of the document just handed to you as an exhibit in the case?

The Referee: This document (indicating)?

Mr. Wellins: Yes.

The Referee: Oh, no.

Mr. Wellins: We offer that as an exhibit in the case in order that your Honor's ruling disallowing the amendment may be in the record of the case.

The Referee: All right, just a moment until I get my file and I can examine things.

Now, let's see. You want the instrument filed when?

Mr. Horowitz: July 14th, I believe, the stipulation.

The Referee: Let's see whether that is right.

Mr. Wellins: I am not referring to an instru-

ment of July 14th. I am referring to this instrument just handed your Honor——

The Referee: No, the stipulation, we are going to get that in evidence first.

Mr. Wellins: Oh, thank you, your Honor.

The Referee: Let's see whether you have got the right date on that. Is it a stipulation withdrawing the claim of George L. Gibbons?

Mr. Weber: That is correct, your Honor.

Mr. Wellins: Yes, your Honor. [5]

The Referee: Now, that will be—gentlemen, there seems to be something wrong with my exhibit file. Let me send it out to be adjusted and then we will take this matter up before the noon recess.

Mr. Horowitz: There is another defense that they are trying to interpose also, a sixteenth defense in that document, not only—your Honor will note that they——

The Referee: I have denied their motion to amend but I am going to mark it as an exhibit for identification so it will be in the file.

Mr. Horowitz: Thank you.

The Referee: Do you want to call Mr. White as a witness?

Mr. Horowitz: Yes, your Honor.

The Referee: You have been sworn, Mr. White.

Mr. Wellins: Your Honor, the Trustee, Mr. Quittner, is here this morning and it might possibly save time, and I know that it will be a convenience to Mr. Quittner, if your Honor would hear Mr. Quittner, who wishes to address the Court on the subject of the Fifteenth Defense, which is the effect



of Section 68 of the Bankruptcy Act, and the sections thereunder referred to, on the claim of the respondent White.

The Referee: The motion is denied.

Mr. Wellins: Pardon me?

The Referee: You made a motion that I hear Mr. Quittner. The motion is denied. However, you have your Mr. Callister [6] sitting here. He is a busy man also, as you all are, but the rest of you have to stay here. Any possibility of getting Mr. Callister on?

Mr. Wellins: Yes.

Mr. Callister: I have a deposition, your Honor, and I would consider it a favor if you could take me now, ask me whatever they want me for.

The Referee: Any objection, gentlemen?

Mr. Horowitz: No, if the Court please, but may we inquire what matter Mr. Callister is going to be examined on, what defense?

Mr. Wellins: On all issues raised by the pleadings.

The Referee: What?

Mr. Wellins: On all issues raised by the pleading. His testimony will be on all issues raised by the pleadings.

The Referee: How long will he take?

Mr. Wellins: Perhaps about 15 minutes or so, maybe a little longer.

The Referee: In other words, he is in defense now on the merits; is that correct?

Mr. Wellins: He will be out of order, in defense on the merits.

The Referee: There will be no more evidence on the special defenses already ruled on.

Mr. Wellins: Is that the ruling of the Court, or are you asking counsel if we have any more evidence? [7]

The Referee: No, I say there will be no more evidence on the special defenses already ruled on by the Court. Now, the only evidence we have to be taken is on the case in chief, namely, the assertion by Mr. White that he has the right to recover the money now in the hands of the Trustee—evidence on that ground. As to any of the defenses of estoppel or anything like that, we are all through with those except the last one which I said would embrace practically the same question as the case on its merits.

Mr. Weber: May we have the Court's indulgence for just a moment?

The Referee: Yes.

Mr. Wellins: If the Court please, I understand your Honor's ruling and in complete deference to it I think we would like to make an offer of proof in order to protect the record.

Since Mr. Reed Callister is now here, we offer to prove if Mr. Reed Callister were called as a witness and permitted to testify with respect to the subjects of affirmative defense, that he will testify that he had a conversation while he was attorney for Mr. Joseph G. White with another attorney named George M. Wiener who was then counsel for Mr. Gibbons, the payee on the promissory note, during the time just prior to the consummation of the

Trustee's compromise with Mr. Gibbons and prior to the time that Mr. Horowitz was substituted as Mr. White's lawyer, in which Mr. [8] Wiener told Mr. Callister that negotiations were pending between the Trustee and Mr. Gibbons for the settlement and compromise of the Trustee's suit against Mr. Gibbons involving, among other things, the promissory note action between Mr. Gibbons and Mr. White, and that if Mr. White wanted to consummate any kind of a settlement with Mr. Gibbons he had better hurry up before Mr. Gibbons closed his transaction with the Trustee.

We further offer to prove that Mr. Callister if called as a witness with respect to the subjects of affirmative defense will testify that that while he was still attorney for Mr. White, and before Mr. Horowitz had been substituted as Mr. White's attorney, he, Mr. Callister, knew that the Trustee had settled and compromised his claim against Mr. Gibbons and that—may I re-word the last portion of it, if your Honor please?

The Referee: Yes.

Mr. Wellins: That Mr. Callister knew that the Trustee's lawsuit against Mr. Gibbons had been settled, and that this took place prior to the time that Mr. Horowitz became the attorney for Mr. White.

The other matters about which Mr. Callister is here to testify refer to the case in chief as distinguished from the affirmative defenses.

Mr. Horowitz: If your Honor please, we object to that on the ground that it is incompetent, irrele-

vant and immaterial, [9] on the further ground that the issue has been closed, and that I noticed that when Mr. Wellins was making his offer of proof Mr. Callister was violently shaking his head in the negative to——

The Referee: Well, we will leave that out of your objections, because——

Mr. Horowitz: That is right. I am through with my objection. In other words, there should be some disposition of the case and if we have these offers of proof and other matters coming up we will never be through with the case.

The Referee: Well, the record will show that in ruling on each and all of these affirmative defenses the Court in each instance inquired, "Is there further evidence," and the matters were closed. The Court made its rulings; and I am sure we all agree that this case has been before this Court and other Courts for a long time and we should get through.

The objection is sustained.

Now, is there still any possibility of getting Mr. Callister out of here without tying him up? Mr. White has to stay here, and Mr. Horowitz and Mr. Howard and the rest of you have to stay here. Mr. Callister doesn't.

Mr. Horowitz: We have no objection.

The Referee: Do you want to call him now or can't you call him until the other side puts on its evidence?

Mr. Wellins: Let me talk with Mr. Callister a second. [10]

I would like to put Mr. Callister on out of order, if the Court please.

The Referee: All right, you may step down, Mr. White.

Come along, Mr. Callister.

REED E. CALLISTER

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name in the record.

The Witness: My name is Reed E. Callister. I am an attorney at law.

The Referee: All right.

Direct Examination

By Mr. Wellins:

Q. Have you at one time been attorney for Mr. Joseph G. White?      A. I was.

Q. And during what period were you his attorney?

A. I would have to look at my records, if I may. I can't recall the exact time.

Mr. Horowitz: May I inquire whether this is with respect to a specific defense? If it is, may we have the specific defense so we will know what—

The Referee: I think we will let counsel proceed. You may make your objections to specific questions.

Mr. Horowitz: Thank you. [11]

The Referee: Proceed.

The Witness: If your Honor please, it was some



(Testimony of Reed E. Callister.)

time the latter part of May, 1947, to my best recollection.

The Referee: All right, proceed.

Q. (By Mr. Wellins): And did you have a discussion with Mr. White at or about that time regarding the formation of a corporation?

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial to any issue in this matter.

The Referee: I will sustain the objection. Mr. Wellins, you are not going back into the lawsuit which was tried before Judge Stephens?

Mr. Wellins: We certainly are not, your Honor. We are not asking you to go back into it at all.

The Referee: I'm afraid we will have to hold Mr. Callister until we have the respondent's case so we will know what you are getting at.

Mr. Wellins: All right. Perhaps that is correct. I only did that for his convenience anyhow.

The Referee: I know. I would like to accommodate him but we will hear no evidence on anything related to the lawsuit decided by Judge Stephens.

The Witness: Could I come by 'phone call? I will come immediately.

The Referee: Well, we have had a lot of delays, Mr. [12] Callister. We cannot have any more delays.

The Witness: I wouldn't inconvenience the Court. I appreciate your courtesy in the matter.

The Referee: We have gotten to the time now where time is important. I don't think, however,

they will get to you before noon. What do you think, Mr. Horowitz?

Mr. Horowitz: I think we will be through with our testimony in 5 minutes.

The Referee: Oh, you will?

Mr. Horowitz: Yes.

The Referee: All right; come along, Mr. White.

### JOSEPH G. WHITE

recalled, having been previously duly sworn and examined, testified further as follows:

The Referee: You have been sworn, Mr. White. Proceed, counsel.

### Direct Examination

By Mr. Howard:

Q. Mr. White, you executed a promissory note in the sum of \$5,000.00 in favor of George L. Gibbons, did you not? A. Yes, I did.

Q. Will you tell us the circumstances under which that note was executed?

A. Well, Mr. Al Herd's account was attached at the bank and Al Herd asked me if I would sign a note for \$5,000.00 [13] in order to get the bank account released, and he told me just as soon as his bank account was released he would pay that note, which would only be a week or ten days at the most, just as soon as his bank account was in order.

Q. Did you have any understanding or arrangement—what was your understanding with Al Herd

(Testimony of Joseph G. White.)

as to whether or not you were to receive anything in connection with the execution of that note?

Mr. Wellins: Just a second. The form of the question is objected to as calling for a conclusion of the witness.

The Referee: Sustained.

Q. (By Mr. Howard): Did you in fact receive anything in connection with the execution of that note? A. No, I did not.

Mr. Wellins: I object to the question—I move to strike the answer for the purpose of making an objection.

The Referee: Motion granted.

Mr. Wellins: I object to the question as calling for a conclusion of law from the witness.

The Referee: Objection overruled. The answer may stand as the answer the question.

Mr. Howard: I did not hear the answer to the question.

(Answer read.)

Mr. Howard: No further questions.

The Referee: Cross-examine. [14]

### Cross-Examination

By Mr. Wellins:

Q. Mr. White, when did you sign that note?

A. Oh, that I couldn't tell you. I don't exactly remember when it was. I think it was the day that his bank account was released, the Al Herd bank account was released.

(Testimony of Joseph G. White.)

Mr. Horowitz: The note is here. I think that will fix the date.

The Referee: The note is in evidence, is it not?

Mr. Horowitz: Yes, Your Honor.

The Referee: All right, the note is in evidence.

Q. (By Mr. Wellins): I will show you a photostatic copy of the note to refresh your recollection and call your attention to the date as May 19, 1947.

A. That is right.

Q. That is the date you signed the note?

A. That is right.

Q. All right. Now, at that time did you know that Al Herd was engaged in the automobile business? A. Yes, I did.

Q. Did you know that his place of business was at Sunset Boulevard and LaBrea Avenue in Los Angeles? A. Yes.

Q. And did you at that time—had you at that time already had a meeting with Al Herd at the Hollywood Athletic Club? [15] A. Yes.

Q. And had you at that time also had a meeting with Al Herd at the Morris Plan Bank?

A. Yes.

Q. And had you at that time information that there was a person named George L. Gibbons who had a claim for certain monies from Al Herd?

A. At that particular meeting, the first meeting?

Q. No, no, when you gave this note of \$5,000.00, you knew that Mr. Gibbons claimed Al Herd owed him some money, didn't you?

A. I knew that Mr. Gibbons had his bank ac-

(Testimony of Joseph G. White.)

count attached. That is all I knew, that his account was attached.

Q. And did you know that—at the time you gave this note, do you remember the fact that a man by the name of Karl also gave a \$5,000.00 note to Mr. Gibbons?           A. Yes, I do.

Q. Now, under what—what were the circumstances of that?

Mr. Howard: I object to that, if the Court please. It wouldn't be relevant to the issues in this case, as to why another third party gave a note to Mr. Gibbons.

The Referee: Sustained.

Mr. Wellins: Oh, it is, Your Honor, it is.

The Referee: I'm sorry, no argument.

Mr. Wellins: We offer to prove it is part of the same [16] transaction and it shows the consideration in part.

The Referee: Sustained. The only evidence on direct examination was that Mr. White received nothing. It is improper cross-examination to the direct evidence but if there is any further evidence you can offer this if it is relevant. Proceed.

Mr. Wellins: We objected to the question, if the Court please, about what he received. I take it from the Court's answer that the Court did not consider that a conclusion of law but rather a statement of fact by the witness of what he received. I—and embraced the whole essentials of consideration. I don't think anything that would be con-



(Testimony of Joseph G. White.)

sideration to him under the law would be proper cross-examination.

The Referee: The ruling stands. Proceed.

Mr. Wellins: All right.

Q. Did you receive a note in the sum of \$30,000.00 from Al Herd on the same date that you executed and delivered the note of \$5,000.00 to Mr. George L. Gibbons? A. Yes.

Q. I show you this note for \$30,000.00, signed by Al Herd, payable to your order, and ask you if this is the note? A. That is right.

Mr. Horowitz: What is the date of that, counsel?

Mr. Wellins: May 19, 1947. Is that in evidence?

Mr. Weber: We got leave to substitute a photostatic [17] copy of this note.

Mr. Wellins: We offer this note in evidence as the Trustee's exhibit next in order, asking leave to substitute a copy.

Mr. Horowitz: I think that is in evidence.

The Referee: I thought that was already covered.

Mr. Wellins: I'm not sure whether it was or not.

Mr. Horowitz: I think it was. There was the \$25,000.00 that Mr. White gave to the Morris Plan Bank and \$5,000.00 to Mr. Gibbons and the \$30,000.00 note he gave to Mr. White.

The Referee: In any event, I'm sure counsel will stipulate he received the \$30,000.00 note from Mr. White.

Mr. Horowitz: That is right.

Q. (By Mr. Wellins): This is the same date

(Testimony of Joseph G. White.)

you gave the \$5,000.00 note to Mr. Gibbons?

A. It could have been the same day or the day after or a few days after.

Q. Mr. White, did Mr. Al Herd give you a paper with reference to a 10 per cent interest in his automobile business at or about the time that you gave Mr. Gibbons this \$5,000.00 note?

A. Mr. Herd never gave me any interest. I never got any interest, none whatever.

Q. Did Mr. Herd ever give you a paper transferring to you a 10 per cent interest in his automobile business at Sunset and LaBrea? [18]

Mr. Horowitz: Just a moment. We will object to that question on the ground that it is incompetent, irrelevant, and immaterial, not cross-examination.

The Referee: Sustained. I think if counsel has the paper he should produce it and show it to the witness.

Q. (By Mr. Wellins): Mr. White, you have previously been questioned about a certain paper purporting to transfer to you a certain 10 per cent interest in Al Herd's business, have you not?

Mr. Horowitz: I just don't understand the question.

The Referee: Will you please finish your question and say where he was questioned?

Mr. Wellins: In this court.

The Referee: In this court? All right.

The Witness: At one time Al Herd offered me a 10 per cent interest in his business if I would

(Testimony of Joseph G. White.)

carry through with Al Herd. In other words, I would—Al Herd wanted me to give him about another \$65,000.00 for outstanding checks and what not, insufficient checks and what not, and I told Al Herd then, I said, “Al, I didn’t mind”——

Q. (By Mr. Wellins): Just a second. What was the date of the occasion you speak of?

A. What was the occasion?

Q. No, what was the date of it?

A. Oh, that was about the time Al Herd was—left for Mexico. [19]

Q. Was it at or about the time that you gave the note to Mr. Gibbons, Mr. White?

A. No. That was quite a while after I signed that note for Mr. Gibbons.

Q. How long afterwards?

A. Oh, I don’t know. I would say maybe a month.

Q. What has become of that paper, Mr. White?

A. I don’t have it. I don’t have any paper for——

Q. When did you last have it?

Mr. Horowitz: Just a moment. The witness said he never had it.

The Referee: Sustained. Proceed.

Q. (By Mr. Wellins): Did Mr. Al Herd give you that paper?

Mr. Horowitz: Now, just a moment. We will object to the question. If there is a document let’s show him the document or a copy of the document

(Testimony of Joseph G. White.)

so we will know what he is talking about.

The Referee: Sustained.

Mr. Wellins: As counsel well knows we are trying to show to the Court what has happened to the paper and account for its whereabouts. The paper was delivered to the witness, and if the witness will answer the questions that will appear. He was the last one that had it.

The Referee: In any event, let's assume Mr. Herd gave this gentleman a paper where he transferred or agreed to [20] transfer a 10 per cent interest in the business. Doesn't that come within the scope of the partnership litigation?

Mr. Horowitz: Yes, Your Honor.

Mr. Wellins: Certainly not, Your Honor.

The Referee: Why not?

Mr. Wellins: We have to prove to this Court——

The Referee: Here is my point, if I can make myself clear: Certainly if you had shown to Judge Stephens that Mr. Herd had delivered to Mr. White and Mr. White had accepted an interest which transferred 10 per cent of the business to Mr. White, would that not have sustained your cause of action against Mr. White?

Mr. Wellins: Your Honor is going a step beyond the 10 per cent paper in his thinking, and I appreciate how forehanded Your Honor is in his analysis of the matter; but as Your Honor very aptly put it the last time we were in court, we are not concerned here with whether Mr. White was Mr. Herd's partner, and that is all Judge Stephens

was called upon to decide. We are concerned with whether or not this was an accommodation transaction, or if not being a partnership it was certainly something other than accommodation by way of certain consideration that moved to the parties.

The Referee: All right, but as I say, supposing that the instrument was delivered, it was accepted, and it was a present transfer or assignment of a 10 per cent interest. What would that have made Mr. White and Mr. Herd? [21]

Mr. Wellins: There was testimony in the partnership action, if Your Honor wants to hear my explanation, as to what happened later with that paper, and that it was subsequently, according to Mr. White's testimony, modified and not acted upon as such by him but that instead a different type of business relationship was inaugurated between Mr. Herd and Mr. White in place of the 10 per cent paper. This 10 per cent paper is one of the indications that Mr. White anticipated a financial gain from his transaction with Mr. Herd, and this Gibbons note is one of the things that are involved in Mr. White's giving of his money or credit on behalf of Mr. Herd, and what he expected to receive in the way of some gain or benefit is limited in part by the receipt of this 10 per cent paper.

The Referee: Well, let's assume, Mr. Wellins, that you and Mr. Weber will show that Mr. White at the time he gave Mr. Gibbons the note hoped that thereby he might later on gain something from Mr. Herd, an interest in the business or what not; but it has been established judicially that he did



not acquire an interest in the business, did not become a partner. Therefore, in view of that ruling, notwithstanding Mr. White's expectation, if this note were now in Mr. Herd's hands as distinguished from the hands of the Trustee in Bankruptcy could Mr. Herd enforce it against Mr. White merely because at the time the note was given Mr. White expected to get something which he never did [22] get?

Mr. Wellins: That question must be limited to exactly the way Your Honor puts it. It covers two subjects. The last part of it would have to be answered no, but the first part of it assumes something more than Judge Stephens decided. Judge Stephens only decided that they weren't partners.

The Referee: In any event, this sort of discussion and testimony was in the partnership case, wasn't it?

Mr. Wellins: Yes, Your Honor.

The Referee: All right, objection sustained. Give me something that you didn't have over in the partnership case. Sustained. Proceed with your questioning, please.

Mr. Weber: In view of the Court's ruling, I can see nothing remains for us to do but make an offer of proof.

The Referee: Very well.

Mr. Weber: We offer to prove that at or about the time of the execution of the Gibbons note by the respondent White there was a paper purporting to evidence a 10 per cent interest in favor of Mr. White in the Herd business; that no interest on the

loan from White to Gibbons was ever discussed with Herd; that one Dick Allard, the brother-in-law of the respondent White, made a trip to the City of Rialto in the month of May, 1947, to ask the respondent White to advance certain monies, including the Gibbons note, with the aim in view of giving Mr. Allard a 15 or 20 per cent interest in the Herd business; that pursuant thereto Mr. [23] White thereafter had meetings with Mr. Herd and others, in the course of which a \$25,000.00 note was given to the Morris Plan Bank, the one in evidence; that the \$5,000.00 note was given to Mr. Gibbons; that the parties discussed the formation of a partnership; that at or about that time they consulted or retained Mr. Reed Callister with the aim in view of forming a corporation known as Al Herd, Inc., to do business in association under corporate form; that thereafter the corporation of Al Herd, Inc., was formed under the laws of the State of California in or about the early part of June pursuant to previous meetings hereinafter referred to; that the parties discussed the relative merits and demerits of doing business in association, either in partnership or corporate form; that Mr. White at or about that time was advised not to go into the partnership but to go into the corporate structure; that the parties also discussed—that is the respondent White and Herd—discussed at or about the time the transaction with Gibbons took place the assumption of debts that Herd had theretofore incurred in connection with his automobile business; that at or about the same time the parties discussed

the transfer and assignment of certain assets of Herd to the corporation that the parties had in view in those meetings and at the time of the Gibbons transaction;

That there were transactions had at or about the time of the Gibbons transaction concerning the liabilities of [24] Herd, and that the respondent White at or about the time of the execution of the White note to Gibbons informed himself as to the assets and liabilities of Herd and obtained a financial statement of at least part of the liabilities of the bankrupt; that the parties discussed, and by "parties" I mean the Respondent White and the bankrupt, discussed with one Richard Stone a division of the so-called auction phase of the bankrupt's business, in the course of which there was an agreement reached on a division of the auction business in three ways, that is an equal division, a three-way split, one-third to White and one-third to Herd and one-third to Stone;

That to initiate that agreement or understanding of the parties a written document was prepared and signed between Al Herd, Inc., and Richard Stone; that at or about that time the respondent White went to the City of Rialto in connection with a plan to raise money by either selling or encumbering his orange grove in the City of Rialto, with the aim in view of placing the proceeds in the business; that he went to the City of Chicago at or about that time, or in the month of June, 1947, for the purpose of raising additional money to put into the automobile business; that he had requested or that

he also discussed with Mr. Herd certain employment security for Mr. Allard, his brother-in-law, in connection with the automobile business; that at or about the same time, or shortly thereafter, or in the month of June, 1947, this respondent [25] made payments to a number of creditors of the bankrupt, including but not limited to one Dillon, Richetti, and Slabdonick;

That on or about June 6, 1947, he paid the payroll of the Herd automobile business by checks issued by the Bank of America, Redondo Beach, and drawn upon the account of the respondent, and that the respondent discussed at meetings at the Hollywood Athletic Club a number of other percentage participation interests in the Herd business, depending upon the amount which was ultimately advanced or agreed to be advanced in connection with the automobile business.

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial, and not proper cross-examination, and I might say also that what counsel has mentioned is simply some of the numerous items that were litigated in full in the Superior Court action on which we spent so many days and which is now *res adjudicata* between Mr. White and the Trustee in Bankruptcy.

Mr. Weber: For the sake of the record, I would like to state that this offer has not been made with the aim in view of establishing a partner relation. It is the position of the Trustee that the relationship between the respondent White and the bankruptcy may have been something other than



partnership, but in any event this is competent evidence to indicate that in the execution of the Gibbons note the respondent had in view the expectation of a possible benefit, [26] even though being short of a partnership relation. In other words, a negative finding on the existence of a partnership does not negative the existence of some other or lesser business interest or benefit situation.

The Referee: The objection is sustained.

Mr. Weber: And continuing the offer, I offer in evidence a series of checks previously marked in evidence in the Superior Court action entitled Gibbons vs. White, the checks collectively marked Plaintiff's Exhibit 6, consisting of 5 checks, all of which are dated June 6, 1947, drawn on the Bank of America, Redondo Beach, for the account of Joseph G. White.

The Referee: Is there objection?

Mr. Horowitz: Are you through with your complete offer, because I'm not going to make the objection until you are through because each time the objection is sustained they have an idea, which I hear a rumbling of, and I want to make the objection now when they are all through with their offer.

Mr. Weber: The payees of which are as follows: William F. Hamm, Barbara Felton, Harrison Carroll, Ann Allen, Richard Allard, all of which payees are employees of the Herd business.

We offer to prove that.

We also offer in evidence a series of additional checks, a check dated June 4, 1947, payable to J.



E. Dillon in the [27] sum of \$400.00, by Joseph G. White, drawn on the Bank of America, Redondo Beach; and we offer to prove further that Mr. Dillon was a creditor of the Herd business.

We introduce in evidence a check dated June 7, 1947, in the amount of \$500.00, payable to one Glen Miller, drawn by Joseph G. White on the Bank of America, Redondo Beach; and we offer to prove that Glen Miller was a creditor of the Herd business.

We offer in evidence a check dated June 4, 1947, payable to Hal Engels in the sum of a thousand dollars, drawn by Joseph G. White on the same bank; and we offer to prove that the said Hal Engels was a creditor of the Herd business.

We offer in evidence a check dated June 6, 1947, payable to one John J. Burkhard, in the sum of \$88.10, drawn by Joseph G. White on the Bank of America, Redondo Beach; and we offer to prove that the said John J. Burkhard was then an employee of the Herd business.

We offer in evidence a check dated June 6, 1947, in the sum of \$53.42, payable to one Thurman Lee Chidester, drawn by Joseph G. White on the same bank; and we offer to prove that at that time the payee, Thurman Lee Chidester, was an employee of the Herd business; and in each case where the check is payable to an employee we offer further to prove that the check was in compensation or payment of

earnings or wages due in connection with the Herd business.

We offer in evidence check dated June 5, 1947, payable [28] to one F. J. Sanders, drawn by Joseph G. White on the same bank, for \$537.50; and we offer to prove that the said F. J. Sanders was a creditor of the Herd business.

We offer in evidence a check dated June 2, 1947, in the sum of \$1,000.00, drawn by Joseph G. White on the Bank of America, Redondo Beach, payable to one George Slabdonick; and we offer to prove that the said George Slabdonick was a creditor of the Herd business; and wherever I have referred to creditors of the Herd business we offer further to prove that these checks were in payment of obligations owed by the business to the respective creditors.

We offer in evidence—oh, this is already in evidence, if the Court please.

We offer in evidence the exhibit collectively marked Plaintiff's Exhibit 19 in the accounting action brought by the Trustee against Joseph G. White in the Superior Court, consisting of the Articles of Incorporation of Al Herd, Inc., dated May 28, 1947, and acknowledged on that date, bearing the signature of Al Herd, Joseph G. White, and Marcella M. White, the wife of the respondent White; the By-laws of said corporation, to wit, Al Herd, Inc., acknowledged June 11, 1947, and signed by Al Herd, Joseph G. White, and Marcella M. White as directors; the Waiver of Notice of First Meeting of Stockholders, dated June 11, 1947;

the Minutes of the First Meeting of the Incorporators of Al Herd, Inc., on that date, signed by Joseph G. White as [29] Secretary and Al Herd as Chairman; The Waiver of Notice of First Meeting, bearing that date, signed by Al Herd, Joseph G. White, and Marcella M. White; the Minutes of the First Meeting of the Board of Directors of Al Herd, Inc., held June 11, 1947; a sample stock certificate; the Minutes of the Board of Directors of Al Herd, Inc., held June 20, 1947, signed by Al Herd, Joseph G. White, and Marcella M. White; and the Permit issued by the Commissioner of Corporations of the State of California, dated June 18, 1947, authorizing the issuance to Al Herd, Joseph G. White, and Marcella M. White, an aggregate of not to exceed, to any or all of them, 50 of its shares at par for cash.

We offer in evidence Plaintiff's Exhibit 36 in the action entitled Quittner vs. White, which is a copy of an Auction Notice issued with the consent of the respondent White in connection with the sale of his ranch or orange grove at the City of Rialto, the proceeds of which were to be applied to the Herd business.

We offer in evidence a certified Copy of the Articles of Incorporation of Al Herd, Inc., which is endorsed with the filing stamp June 9, 1947, Secretary of State.

We offer in evidence what appears to be a schedule previously marked Plaintiff's Exhibit 14 in the accounting action entitled Quittner vs. White, which bears the legend, "Recap—Outstanding Debts," and

we offer further to prove that this schedule was prepared at the direction of the [30] respondent; that the liabilities therein listed pertain to the Herd business; that the handwritten comments on the reverse side of the last page reading, "Jack Prager, \$2200.00, Dillon, \$800.00, George Slabdonick, \$1200.00, and Mansfield, question mark," were affixed thereto by the respondent White in his handwriting, and that the individuals last named were at the times previously mentioned, or about those times, creditors of the Herd business.

We offer in evidence the exhibit which was previously marked in another proceeding in this court, Your Honor, the assignment dated May 21, 1947. It has been marked as an exhibit in connection with the Pacific Finance matter as I recall. Is the exhibit file handy, Your Honor?

Mr. Horowitz: Are you through with this offer of proof? Is this something different from your offer of proof?

Mr. Weber: No, this exhibit was offered in another case.

Mr. Horowitz: I mean are you through with your offer of proof?

Mr. Weber: No, not quite through.

Mr. Horowitz: All right.

Mr. Weber: Here it is right here.

I offer in evidence a copy of the assignment dated May 21, 1947, previously marked Trustee's Exhibit A for identification on October 4, 1949, which is a true copy of [31] the exhibit marked Plaintiff's Exhibit 26 in the accounting action en-

titled Quittner vs. White; and in that connection we might segregate that assignment from the other exhibits, and we propose to make that offer quite apart from the other exhibits which are offered at this time.

We offer in evidence——

Mr. Horowitz: You offer to prove now?

Mr. Weber: No, we are offering the exhibit.

Mr. Horowitz: All right.

Mr. Weber: We offer in evidence the Application for Stock Permit with respect to Al Herd, Inc., dated June 11, 1947, and signed Cannon & Callister by Reed E. Callister, and acknowledged on June 11, 1947, previously marked Plaintiff's Exhibit 20 in evidence in the accounting action entitled Quittner vs. White; and we offer to prove further that this was prepared by Mr. Callister pursuant to the instructions of the respondent White.

We offer in evidence Application to the Board of Police Commissioners for a permit to conduct a secondhand motor vehicle business, dated July 15, 1947, signed by Joseph G. White, previously marked Plaintiff's Exhibit 37 in the accounting action entitled Quittner vs. White; and the portion of this exhibit insofar as it is material is the portion reading as follows: "How much"——

The Referee: Please don't read any part of an instrument. Proceed. [32]

Mr. Weber: Well, we offer to prove that by this exhibit the respondent White admitted that he had 5 months previous experience, that is previous to



July 15, 1947, in the used car business.

I believe that completes the offer.

Just one moment, Your Honor.

We offer further to prove that in partial consideration for the execution of the note from White to Gibbons the note of one Harry Karl was executed and delivered to Gibbons, as a result of which Gibbons gave Herd a credit and applied the Karl note in the sum of \$5,000.00 against the indebtedness that was then due from Herd to Gibbons, and in consequence of which the indebtedness was reduced commensurately.

We further offer to prove that as partial consideration for the execution of the note from White to Gibbons, respondent White also contemplated a possible benefit or participating interest as well as employment security for and on behalf of Dick Allard, his brother-in-law.

The Referee: Anything else?

Mr. Weber: We offer further to prove that the respondent White admitted to one Reed Callister that he expected to receive or hoped to receive as much as a thousand dollars a week out of the auction business or out of the Herd business.

The Referee: Anything else?

Mr. Weber: That the matters which I have proposed and offered to prove took place at or about the time of the [33] transactions between White and Gibbons and that these transactions were all part of a general expectation of a consideration on the part of respondent White in the way of a par-

ticipating interest and other increments flowing from the Herd business to the respondent White.

The Referee: Now, is there anything else?

Mr. Weber: I think that completes it, Your Honor.

The Referee: All right.

Mr. Horowitz: To which we renew the objection which we heretofore made to the prior offer of proof immediately preceding this last offer; and I might say in amplification all that counsel has done has been to call attention to each and every one of the exhibits which was the basis of their action in the state court in the case of Quittner vs. White, which has been adjudicated.

The Referee: The objection is sustained. Proceed.

Mr. Weber: May I inquire whether or not I can excuse a witness by whom I expected to prove some of these matters, Mr. Jack Burkhard, who is in court?

The Referee: You may excuse any witness you want, Mr. Weber.

Mr. Weber: We offer to prove at this time through one Jack Burkhard who is in court——

Mr. Horowitz: Wait a minute. Let's finish the cross-examination of Mr. White.

The Referee: I think so. I gave you an opportunity to [34] state your offer of proof and you said you were through.

Mr. Weber: Except Mr. Burkhard has an engagement at noon and I would like to excuse him.

Mr. Horowitz: We have no objection to excusing

Mr. Burkhard, but you have made your offer of proof. Now are you going to repeat your offer of proof and then repeat it again as to Mr. Callister?

Mr. Weber: That is not the situation at all. I thought in view of him being here all morning——

The Referee: Let me see if I understand you, Mr. Weber. Have you made your offer of proof only as to what you intend to prove by Mr. White or are you making your offer of proof as to what you intend to prove by any and all witnesses?

Mr. Weber: These are the matters which we offer to prove by the respondent White.

The Referee: Very well. Now you want to make an offer of proof as to what you intend to prove by the witness Burkhard?

Mr. Weber: That is right. It will take about 30 seconds.

The Referee: All right, go ahead.

Mr. Weber: We offer to prove by the witness Jack Burkhard, who is here in the court room, that at a meeting at the Hollywood Athletic Club shortly or immediately prior to the execution of the promissory note by Mr. White to Mr. Gibbons there was a discussion concerning participation [35] interests and ownership in the form of a participating interest in favor of White in the Herd business, both auction and retail; that different percentages were discussed with respect to the amount of the percentage, ranging from 25 per cent to 50 per cent, depending on the amount Mr. White ultimately put up or advanced; that those percentages were discussed relative to Mr. White's execution of the

note to Gibbons in order that the Writ of Attachment which Gibbons had executed and levied on assets of Herd might be lifted, and that the purpose of that note as discussed at that meeting was to enable the Herd business to continue to function in order that White might participate in that business and secure to himself certain profits or emoluments therefrom, and that practically every day thereafter Mr. White visited the lot, that is the premises at 7077 Sunset Boulevard, and participated actively in the conduct of the business and participated in discussions with dealers and buyers and so comported himself generally as to indicate a business interest in Al Herd.

The Referee: Anything else? Have you completed your offer of proof?

Mr. Weber: That completes it.

Mr. Horowitz: To which we make the same objection as we did heretofore.

The Referee: Objection sustained. Mr. Burkhard is excused. Anything else? [36]

Mr. Weber: Well, with respect to Mr. Callister, we offer to prove that he was consulted by Mr. White in connection with the formation of a corporation known as Al Herd, Inc.; that he participated in the discussions with one Donn Downen, a member of the California Bar, as to the relative advantages and disadvantages of partnership vs. corporation; that pursuant to Mr. White's instructions he formed Al Herd, Inc., in the early part of June, 1947; that the conversations to which I have referred took place shortly prior to the formation of Al Herd, Inc.; that in those conversations be-

tween Mr. White and Mr. Callister, Mr. White told Mr. Callister of his expectation that he might get as much as a thousand dollars a week in the way of income from the Herd business, and expressed that hope, and that Mr. White told Mr. Callister that a Chicago lawyer consulted by Mr. White had told him that it would be more advisable to go into business with Mr. Herd under a corporate form rather than partnership; that pursuant to Mr. White's instructions Mr. Callister sent an accountant by the name of Dickinson of Los Angeles to the automobile lot of Mr. Herd, with the aim in view of analyzing and examining the books and records of the Al Herd business.

Might I have the Court's indulgence for half a moment?

The Court: Yes.

Mr. Weber: That in a conversation with Mr. George M. Wiener, attorney for Mr. Gibbons—that is, between Mr. [37] George M. Wiener, attorney for Mr. Gibbons, and Mr. Reed Callister, who was then attorney for the respondent White in the promissory note action, to wit, case No. 533,306—Mr. Wiener said to Mr. Callister in words or in substance that Mr. White had offered \$2,000.00 in settlement of the promissory note; that it had been rejected; that the Trustee—or that Mr. Gibbons or his attorney Mr. Wiener was in position to receive from the Trustee in Bankruptcy a credit of \$5,000.00, the amount of the note, on a settlement or on any settlement which might be consummated between the Trustee in Bankruptcy and George L.



Gibbons, which action was then pending in the United States District Court for the Southern District of California.

Mr. Horowitz: To which we make the objection heretofore made.

The Referee: The objection is sustained. Is that all? May Mr. Callister be excused?

Mr. Weber: There may be an abbreviated way of disposing of one more witness.

The Referee: What about Mr. Callister?

Mr. Weber: Oh, he is excused. I beg your pardon.

The Referee: All right, Mr. Callister is excused. Thank you, Mr. Callister.

Mr. Weber: Thanks a lot.

The Referee: Now, you want to abbreviate another witness? [38]

Mr. Weber: Will counsel stipulate that if Mr. Donn Downen were called as a witness he would give the same answers in answer to the questions propounded to him on his examination under Section 21-A, in the 21-A proceeding?

Mr. Horowitz: No. I don't know what they are and I certainly wouldn't stipualte to that at all.

The Referee: Very well.

Mr. Horowitz: And I don't know what the materiality of it is, in addition.

Mr. Weber: The materiality is to show the fact that in these transactions Mr. White was animated by a business interest, and that he did these different things——

Mr. Horowitz: Well, I won't stipulate, counsel.

The Referee: All right. How many more witnesses will you have, Mr. Horowitz?

Mr. Horowitz: We are through, if Your Honor please.

The Referee: How many more witnesses will you have, Mr. Weber?

Mr. Weber: That is about all the witnesses we propose to call.

The Referee: Any more evidence?

Mr. Weber: Oh, there is just one more witness. Just a moment. Excuse me. The offer of proof with respect to Mr. Downen, Your Honor, will be somewhat extended.

The Referee: Well, do you expect to produce him?

Mr. Weber: Well, in view of the Court's ruling— [39] we can produce him, Your Honor, if the Court is going to hear him, but this is matter which the Court has excluded.

The Referee: Well, I don't want you to assume I am going to rule adversely to everything you propose.

Mr. Weber: Well, the ruling of the Court reasonably purports to me——

The Referee: Well, you had better have your witness here because I am certainly not going to stultify myself by saying I am going to rule adversely to you on everything you offer. I will listen to you and make my ruling.

Mr. Weber: No, I am only referring to Your Honor's ruling that these matters are not admissible,

and I thought perhaps there would be no use of getting Mr. Downen down here if the offer of proof could be treated similarly as the other one.

The Referee: No, this Court is human and might change its mind at any moment. Besides, your offer of proof might open up another avenue of thought. If you have any more witnesses please have them here in court at 2:00 o'clock, to which time we will now continue this matter.

But before we do that, let's note in the record that the stipulation withdrawing the claim of Gibbons is now Trustee's Exhibit 15 by reference, and that the proposed amendment to Trustee's Reply to Amended Answer of the Respondent is now Trustee's Exhibit A for identification; and during the noon hour, or will you have a chance, will [40] you gentlemen see whether by sheer inadvertence of course any of you carried away the yellow paper which is——

Mr. Weber: I have it, Your Honor.

The Referee: Oh, here comes a confession right now.

Mr. Weber: I plead guilty and throw myself on the mercy of the Court.

The Referee: It so happens, however, that the original was received in evidence at the first hearing. So they are both here.

All right, two o'clock, gentlemen.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [41]

Tuesday, January 31, 1950—2:00 o'Clock P.M.

The Referee: All right, Mr. Weber.

Mr. Weber: Mr. Wiener.

GEORGE M. WIENER

called as a witness, being first duly sworn, testified as follows:

The Referee: State your name in the record, please.

The Witness: George M. Wiener.

Direct Examination

By Mr. Weber:

Q. Mr. Wiener, you are a member of the bar of the State of California? A. Yes, sir.

Q. Are you a member of the firm of Jones & Wiener of Los Angeles? A. Yes.

Q. Did your firm formerly represent one George L. Gibbons? A. Still do, I think.

Q. From the—did you file an action on his behalf in the Superior Court of Los Angeles County against one Joseph G. White, bearing case No. 533,306?

A. I don't remember the case number but such an action [42] was filed. We filed such an action.

Q. An action on a promissory note for \$5,000.00?

A. Correct.

Q. Do you recall having a conversation with Mr. Reed Callister, attorney for the defendant in that action, on or about April or May, 1948?

(Testimony of George M. Wiener.)

Mr. Horowitz: To which we object on the ground it is incompetent, irrelevant and immaterial, not proper examination, relates to a matter that has already been determined.

The Referee: Well, it is preliminary. Objection overruled. You may answer the question.

The Witness: It would be inaccurate to fix the time of the conversation in any specific month. I could say that I have a recollection some place in that period of having a conversation with Reed Callister.

Q. (By Mr. Weber): And was anybody else present? A. I don't recall. I think not.

Q. Tell us what was said.

Mr. Horowitz: To which we make the objection heretofore made to the former question.

The Referee: Well, of course, I don't know what he is going to say. I will overrule the objection. Go ahead—subject to a motion to strike.

The Witness: I told Reed Callister in substance that the offer of settlement of that action of \$2,000.00 was unacceptable to me, to my client, by virtue of the fact that [43] negotiations were then pending with the attorneys for the bankrupt estate in which the proceeds of our lawsuit would be assigned to the estate at the face value, and therefore we would not be amenable to settling at anything less than face value because it looked like the compromise which was then in negotiation would be the most favorable to my client.



(Testimony of George M. Wiener.)

Mr. Horowitz: At this time we move to strike the answer on the ground it relates to an issue that has already been determined here.

The Referee: Motion granted.

Q. (By Mr. Weber): Now, do you recall a meeting in May of 1947 at which Mr. Joseph G. White was present, in which the promissory note bearing date of May 19, 1947, was discussed?

A. I have no way of fixing the date, counsel. The occurrence that you mention actually occurred in my office.

Q. I show you a photostatic copy of a promissory note dated May 19, 1947, executed by White to Gibbons, and ask you whether you recall a conversation in your office shortly prior to that date at which Mr. White was present?

A. It may have been either shortly prior or on that date.

Q. Who else were present?

A. Mr. White, Donn Downen, and myself, as far as I recollect now.

Q. Where did the conversation take place? [44]

A. In my office at 711 Banks-Huntley Building.

Q. Was anything said in connection with the purpose or reason for the execution of that note to Mr. Gibbons?           A. Yes.

Q. What was said?

A. The conversation was related by either Mr. White or Mr. Downen, I don't recall which, to me, that upon my accepting that note in return for release of the attachment that we then had against

(Testimony of George M. Wiener.)

Al Herd there was a possibility that we would get paid our principal claim in full, and that Mr. White would proceed with his business arrangements with Mr. Herd subject to the Morris Plan going through with their deal, which we had upset or impeded by filing our lawsuit and the collateral writ of attachment.

Q. Did Mr. White say anything in that conversation about the type or extent or nature of the interest he was to have?

Mr. Horowitz: Just a moment. We will object to that as—on the ground that this witness has testified he didn't recall at this time whether Mr. White was present or whether the conversation was with Mr. White or whether this was a conversation that he had with Mr. Donn Downen.

Q. (By Mr. Weber): Was Mr. White present at this conversation? A. Yes, sir.

The Referee: Do you still urge your [45] objection?

Mr. Horowitz: No, Your Honor, if the witness says he was present.

The Witness: Yes, counsel, he was present with Donn Downen. I don't know if anyone else was present. The three of us were present.

Mr. Weber: Will you repeat my last question, Mr. Reporter?

(Record read.)

The Witness: Mr. White said he was going into business with Al Herd but I have no recollection

(Testimony of George M. Wiener.)

of the nature, extent or type of business relationship between Mr. White and Mr. Herd.

Mr. Weber: That is all.

The Referee: Cross-examine.

### Cross-Examination

By Mr. Horowitz:

Q. Mr. Wiener, as I understand the situation, you or your firm on behalf of Mr. Gibbons had filed an action against Al Herd and as a part of that action had levied a Writ of Attachment against certain assets of Mr. Herd?

A. That is correct.

Q. And the question then came up as to whether or not you would release the Writ of Attachment; is that not right?

A. And dismiss the lawsuit.

Q. And dismiss the lawsuit? [46]

A. Yes. That is correct.

Q. And a suggestion was made that Mr. White would give a note to Mr. Gibbons on behalf of Mr. Herd for \$5,000.00?

A. Well, now, I don't know if it was on behalf of Mr. Herd. Mr. White was to give—Mr. White and Mr. Karl were each to give us a promissory note for \$5,000.00. Mr. Herd also gave us a promissory note for 19 or 20 thousand dollars.

Q. Now, was Mr. White present at the time the note was given to you?

A. At the time the note was handed to me?

Q. Yes. A. Yes.

(Testimony of George M. Wiener.)

Q. Well, now, don't you recall that Mr. White was not present and because he was not present you had Mr. Donn Downen sign as a witness to the note? Do you recall that now?

A. No, that is not correct. I recall distinctly why Mr. Downen witnessed it.

Q. And why did Mr. Downen witness it?

A. Because when the note was handed to me it had already been signed by Mr. White and I didn't know Mr. White's signature and I asked for a witness.

Q. And you say Mr. White was there at that time?

A. To the best of my recollection he certainly was.

Q. And you never asked—you could have asked him if [47] that was his signature, couldn't you?

A. Yes, I could.

Q. But you didn't ask him if that was his signature?

A. Oh, yes, I asked him, and then Donn Downen said he had seen him sign it and he would sign it as a witness.

Q. Don't you recall in the State Court action, in which you were also a witness, that this same subject was brought up and you recalled at that time that the note was given to you in the absence of Mr. White and that was why you wanted Mr. Donn Downen to sign it as a witness?

Mr. Weber: I object to it as an improper form of examination. If he has given testimony at vari-

(Testimony of George M. Wiener.)

ance with what he is now giving he has to be confronted with that testimony.

The Referee: Overruled.

The Witness: I don't recall that, counsel. My memory is not too good on these issues, and I certainly don't want to misstate anything. If Mr. White was not present at the time this note was delivered he was present the day before or earlier in the day, or two days before, or almost simultaneously with the execution of this note, at which time the conversation occurred which I have just related.

Q. (By Mr. Horowitz): Then you don't recall the conversation in detail that you related?

A. There were so many of them that I cannot, counsel.

Mr. Horowitz: I think that is all.

Mr. Weber: Just one question, Mr. Wiener. [48]

### Redirect Examination

By Mr. Weber:

Q. At the time the Karl transaction was mentioned who were present, do you recall?

A. Well, I know Donn Downen was present but I don't recall if Mr. White was present or not.

Q. And at the time the Herd note of \$20,000.00 was mentioned who were present, if you recall?

A. Well, you ask me that question—you ask your question in a form as though there were just one meeting at which the Herd note was mentioned.



(Testimony of George M. Wiener.)

The Herd note and the White note and all the notes were mentioned at meeting after meeting, a long series of negotiations.

Q. In any event, these three notes were all jointly discussed?

A. They were all part of one transaction, that is right. •

Q. And at that time the indebtedness of Herd to Gibbons was approximately how much?

A. I have my file here.

Q. Can you tell us from looking at that file approximately what the indebtedness was?

A. If I may have that.

Mr. Horowitz: We will object to that. I don't see any relevancy to what the indebtedness was.

The Referee: Sustained. Proceed.

Q. (By Mr. Weber): Now, at the time the note was delivered [49] to you, that is the note for \$5,000.00 from Mr. White to Mr. Gibbons, at any conversation at which Mr. White was present in connection with the subject matter of that note did Mr. White personally say anything about the attachment interfering in his plans or with his plans to go into business with Mr. Herd?

A. Yes, he did.

Mr. Weber: That is all.

The Referee: Cross-examine.

(Testimony of George M. Wiener.)

Recross-Examination

By Mr. Horowitz:

Q. Mr. Wiener, did Mr. Donn Downen tell you that he was the attorney for Mr. Herd?

A. Yes, sir.

Q. Now, you say there was meeting after meeting after meeting. What is your best recollection of the number of meetings that took place?

A. Well, you understand I had meetings with Reed Callister on behalf of the Morris Plan, with Dan Weber and Marvin Wellins, with Donn Downen and Mr. White, with Al Herd, constantly. I should say over a period of two weeks I was having a meeting or two every day.

Q. Now, can you precisely specify a particular meeting at which a particular thing was said where particular parties were present? [50]

A. Yes, I can. I can fix a meeting where Mr. Herd was present, Mr. White was present, and Donn Downen was present.

Q. And when was this?

A. That was a few days before the execution of the promissory note by Mr. White.

Q. And what other conversation do you remember with particularity?

A. Well, counsel, if you could pinpoint your question a little bit maybe I could recollect a meeting on the point you are interested in, but we had meetings on every possible phase of this. We met with the Morris Plan people, we met with Mr.

(Testimony of George M. Wiener.)

Herd and his representatives right along to see if the matter could be settled without all the parties sustaining a loss, which seemed to be imminent.

Q. You were particularly interested in getting the \$10,000.00 on behalf of Mr. Gibbons?

A. No, I wanted a good deal more than that.

Q. Well, at least \$10,000.00 on behalf of Mr. Gibbons?

A. As far as that goes, that is accurate, yes.

Mr. Horowitz: That is all.

Mr. Weber: That is all.

The Witness: May I be excused, Your Honor?

The Referee: Yes, you may be excused. The next witness.

Mr. Weber: We left a call for Mr. Downen. I guess he [51] isn't here.

The Referee: Anything else?

Mr. Wellins: We would like to complete our cross-examination of Mr. White, Your Honor.

The Referee: You completed it once.

Mr. Wellins: No, these other witnesses I believe were here in court. We had Mr. Callister, and there were some offers of proof.

The Referee: All right, come along, Mr. White.

JOSEPH G. WHITE

recalled for further cross-examination, having been previously duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Wellins:

Q. Mr. White, referring to the date upon which you gave this promissory note for \$5,000.00 to Mr. Gibbons, you knew at that time that Mr. Harry Karl was also giving a \$5,000.00 note to Mr. Gibbons, at the same time? A. Yes.

Q. And referring to the \$30,000.00 note that you received on May 21st from Al Herd, tell us how that sum of \$30,000.00 was arrived at.

A. Well, I signed a \$25,000.00 note for Mr. Herd to the Morris Plan Bank and I signed a \$5,000.00 note for Al Herd to Rusty Gibbons, and so I think it was within a few [52] days I told Mr. Herd, I said, "Listen, I signed \$30,000.00 worth of notes for you, I have nothing to show for it"; so he said, "Well, I will give you a note so in case anything happens to me you are holding that, but," he said, "just as soon as I pay that \$5,000.00 to Rusty Gibbons, that \$5,000.00 note, in turn you give me this back and I will reduce that note."

Q. All right. Now, you arrived at the \$30,000.00 sum on the note Mr. Herd gave you by adding the amount of the \$5,000.00 on the note that you gave to Mr. Gibbons to the \$25,000.00 note you gave to the Morris Plan; is that correct?

A. That is correct.

(Testimony of Joseph G. White.)

Q. At the time you received the \$30,000.00 note, or about that time, you also received an assignment from Al Herd in the form of—do we have an exhibit number, Your Honor, on this assignment?

Mr. Horowitz: That is already in evidence.

Mr. Wellins: I'm trying to get the number on it.

The Referee: Do you mean this one to be photostated?

Mr. Wellins: Yes.

The Referee: No, we haven't assigned any number and won't until it comes in.

Q. (By Mr. Wellins): You received an assignment from Al Herd in the form of the document I now show you; is that correct? [53]

Mr. Horowitz: What date is that?

Mr. Wellins: May 21, 1947.

The Witness: That is right.

Mr. Wellins: If the Court please, I do not know what the state of the record is in regard to an offer of this particular document in evidence. Therefore, I make a formal offer of it at this time. It is an assignment dated May 21, 1947. It now bears the marking, Plaintiff's Exhibit 26, in the prior Superior Court action of Quittner vs. White, and we ask leave to substitute a photostatic copy for the original.

Mr. Horowitz: That has already been made. I mean such an offer has already been made.

Mr. Wellins: Has it been made?

Mr. Horowitz: Yes. It is already in.

The Referee: May I see it?



(Testimony of Joseph G. White.)

Mr. Wellins: Yes, Your Honor.

The Referee: All right.

Q. (By Mr. Wellins): Mr. White, on the date of the petition in bankruptcy here, August 6, 1947, you had not paid any of the money to Mr. Gibbons on that \$5,000.00 note of May 19, 1947, had you?

A. No.

Mr. Horowitz: We will stipulate that he had not. He didn't pay anything on it until after the summary judgment was obtained and the Writ of Execution was issued. [54]

Mr. Wellins: And that was in about December, 1948?

Mr. Horowitz: Yes.

The Referee: The date is immaterial. Go ahead.

Mr. Wellins: May I have a moment, Your Honor?

The Referee: Yes.

Q. (By Mr. Wellins): Mr. White, you also knew, did you not, that at the time you gave this \$5,000.00 note to Mr. Gibbons not only did Mr. Karl give a \$5,000.00 note to him but Mr. Herd also executed a new note to Mr. Gibbons in the sum of \$20,500.00?

Mr. Horowitz: To which we object as immaterial.

The Referee: Sustained. Proceed.

Mr. Wellins: No further questions.

Mr. Horowitz: Just one question.

(Testimony of Joseph G. White.)

Redirect Examination

By Mr. Horowitz:

Q. Mr. White, calling your attention to this assignment of reserves, so-called, to the Morris Plan, did you ever get as much as one cent on account of those so-called reserves?

A. No. The Morris Plan Bank told me that reserve was wiped out.

Q. So you never got as much as a penny?

A. No, sir.

Mr. Horowitz: All right, that is all. [55]

The Referee: Any other questions of Mr. White?

Q. (By Mr. Wellins): Your information in the last answer as to whether or not you got any money on that account is based on what the Morris Plan told you? A. That is right.

Mr. Wellins: I move to strike the answer as a conclusion of the witness, not the best evidence.

The Referee: The motion is denied. He made demand for the money and they told him they didn't have any. It is competent evidence.

Anything else?

Mr. Horowitz: That is all.

Mr. Wellins: We submit that there is no evidence of that, Your Honor.

The Referee: Anything else, gentlemen? Anything else from this witness?

Mr. Horowitz: That is all, Mr. White.

Mr. Wellins: Just a second, if the Court please. No further questions.

The Referee: All right, anything else, Mr. Horowitz?

Mr. Horowitz: No, we rest, if Your Honor please.

The Referee: All right, proceed, gentlemen.

Mr. Weber: There are a few matters in the record we would like to correct. There is a minor one in respect to the date of the Trustee's reply. We would like to amend the date appearing in line 17 on page 2 of the Trustee's reply [56] to read the 13th day of April, 1948.

The Referee: Instead of the 29th day of December, 1948?

Mr. Weber: That is correct. The true date from the evidence, the document has been marked, I believe, is April 13, 1948.

The Referee: Any objection, gentlemen?

Mr. Horowitz: Is that the correct date of the garnishment?

Mr. Weber: Yes, that is the correct date of the garnishment.

Mr. Horowitz: If that is the correct date, we have no objection.

Mr. Weber: That is the date of service.

Mr. Horowitz: Yes, all right.

The Referee: All right, by interlineation the date, the 29th day of December, 1948, line 17, page 2 of the Trustee's reply filed January 25, 1950, is changed by the Referee to the 13th day of April, 1948.

Mr. Weber: In the present state of the record

I am not clear as to whether the Trustee's Exhibit 3 includes the notice to creditors dated May 6, 1948. It may be Exhibits 2 or 3 that include that, and I would like to make sure that that is among the papers so marked.

The Referee: Trustee's Exhibit 2 by reference is certificate of mailing the papers attached thereto, filed May [57] 6, 1948. Does that answer your question?

Mr. Weber: Yes. I inquire whether it includes, however, the notice to creditors dated May 6, 1948?

The Referee: The papers attached to the certificate of mailing are notice of hearing trustee's petitions to compromise controversies and a tabulation of the number of notices required to be sent.

Mr. Weber: Specifically does that include the notice dated May 6, 1948, in connection with the Gibbons compromise?

The Referee: Well, it is a notice dated May 6, 1948, captioned "Notice of Hearing Trustee's Petitions to Compromise Controversies." One of the controversies involved is George L. Gibbons.

Mr. Weber: Thank you, Your Honor.

In reading the transcript of the last hearing I note that we inadvertently did not ask Mr. Wellins a question concerning the conversation that took place at the time of the execution of the receipt which was the subject matter of the testimony of Mr. Howard, and we would like to recall Mr. Wellins to supply that inadvertent omission.

The Referee: All right, Mr. Wellins.

MARVIN WELLINS

recalled, having been previously duly sworn and examined, testified further as follows:

The Referee: Be seated, Mr. Wellins. You have been [58] sworn.

Direct Examination

By Mr. Weber:

Q. Mr. Wellins, do you recall a conversation that took place at the time of the execution of the receipt dated December 14, 1948, which has been received in evidence here? A. Yes.

Q. And where did that conversation take place?

A. It took place at my office which was then located at 417 South Hill Street, Los Angeles.

Q. Who were present?

A. I recall Mr. Howard being present and I recall Mr. White. I also recall hearing in court here——

The Referee: Let's not go over the whole thing. You certainly forget to ask that question, did you? You said you forgot to ask one question. You are starting all over again with the whole conversation.

Q. (By Mr. Weber): Tell us what was said.

Mr. Horowitz: Just a moment. I understood——

Mr. Weber: My recollection is I didn't ask him about the conversation at all, hence the preliminary inquiry with respect to the time, place and persons present.

The Referee: You are saying now you didn't examine Mr. Wellins about the conversation he had



(Testimony of Marvin Wellins.)

with Mr. Howard at the time of the execution of the receipt?

Mr. Weber: I don't recall—— [59]

The Referee: You have a transcript here, gentlemen.

Mr. Weber: I don't recall whether I did or not.

Mr. Horowitz: Of course that matter was gone into.

The Witness: I do not believe that part was gone into.

The Referee: What part?

The Witness: The conversation at the time of the receipt. The only conversation I testified to was the conversation with Mr. Horowitz, not that conversation.

The Referee: Well, let's find out. We have a long record. Let's not make it any longer if we can help it.

Mr. Horowitz: Mr. Howard tells me he didn't testify about that conversation.

The Referee: I'm sorry, Mr. Weber. Go ahead if you want to.

Q. (By Mr. Weber): Who were present, Mr. Wellins?

A. I recall Mr. White and Mr. Howard being there. I do not specifically recall whether Mrs. White was there.

Q. What was said?

A. Mr. Howard said that he and Mr. White had come to pay the money on the case of Gibbons vs. White and that they had brought with them one

(Testimony of Marvin Wellins.)

check for \$5,000.00 and that they would give me another check for the additional amount due to complete the payment, and Mr. Howard asked whether we would deliver to him at that time a satisfaction of judgment. I said no, we would not, we would wait until the checks had cleared before anything of that sort was done, [60] but we would give him immediately a receipt for the two checks he was about to deliver to me. I then called in my secretary and I dictated a receipt in the form which is here in evidence, in the presence of Mr. Howard and Mr. White.

There was further conversation about the amount of court costs that had been incurred, and as the last sentence of the receipt indicates there was an arrangement made with regard to that if they should turn out to be more than the amount given in the check. The form in which I dictated the receipt is the form in which it now appears. The girl typed it up, brought it in, I signed it, Mr. Howard handed me a check for \$5,000.00 and another check for \$1220.00, and that was the end of the conversation. He and Mr. White then left. If Mrs. White was there she left, too.

Q. Was the subject of attachment discussed at all?

A. No, the subject of attachment was not discussed at all.

Mr. Weber: No further questions.

The Referee: Cross-examine.

(Testimony of Marvin Wellins.)

Cross-Examination

By Mr. Howard:

Q. Mr. Wellins, don't you remember a discussion between us about the garnishment or attachment that had been served upon Mr. White? [61]

A. Absolutely not. The only reference to anything that we discussed is contained in the wording of that receipt as I dictated it in your presence.

Q. How did it happen then that you signed as attorney for Mr. Gibbons and as attorney for the Trustee?

A. Because as you well knew I was attorney for Mr. Gibbons and attorney for the Trustee.

Q. And there was no discussion as to the fact that you would sign in both capacities?

A. The only discussion of it was my out-loud dictation of it in your hearing as contained in the receipt.

Q. That was not a discussion. Is your answer that there was no discussion of it at all?

A. No discussion of it whatever.

Mr. Howard: I have no further questions.

The Referee: Any further questions?

Mr. Weber: That is all.

The Referee: Call your next witness. Which one of you—will one of you gentlemen let me have the transcript of last Friday's proceedings?

Anything else, gentlemen?

Mr. Weber: I would like to identify, in order that I may introduce photo copies of the exhibits

which were offered this morning, the particular exhibits that were offered and ask leave of Court to substitute photo copies of the exhibits which were offered; and is it the desire of the Court [62] that they not receive exhibit numbers at this time until they have been physically filed?

The Referee: Those you offered in connection with your offer of proof of course will not be received as exhibits. I don't think it is necessary to encumber the record by having photostats supplied and having them marked as Trustee's exhibits for identification. They are sufficiently identified in the record here so if the Court should overrule the Referee on his ruling there isn't any question what you were talking about. The only purpose of marking a paper for identification is so it may be identified so we know what you are talking about.

Mr. Weber: We ask that the following documents be marked for identification: The exhibit dated May 21, 1947, the assignment from Al Herd to Mr. White.

Mr. Horowitz: That is in evidence.

Mr. Weber: Is that in evidence? I beg your pardon.

The Referee: Is it?

Mr. Horowitz: Yes.

The Referee: You mean it was one we have given permission to photostat and put in evidence?

Mr. Horowitz: Yes, at least twice that permission was granted.

The Referee: Well, now, gentlemen, the only

thing I can do to shorten this situation, counsel for the Trustee will prepare photostats of those instruments which have been [63] received in evidence and will designate those photostats as being in evidence, and one or the other of counsel will please take them to Mr. Horowitz's office and have Mr. Horowitz and Mr. Howard certify that those instruments are to go in evidence if there is no question about it. Then in addition to that, any instruments that you have referred to here in your offers of proof you may have photostats made and mark those to be marked exhibits for identification. Also take those to Mr. Horowitz and Mr. Howard so there may be no misunderstanding. I am sure no one can complain about a paper being marked for identification. That doesn't mean anything at all.

Mr. Weber: We offer in evidence at this time the entire transcript of the proceedings in this Court pursuant to Section 21-A of the Bankruptcy Act.

The Referee: That is much too indefinite, counsel. You will have to get it down to specific examinations of specific persons on specific days.

Mr. Weber: We offer in evidence the testimony given by Joseph G. White, the respondent in this proceeding, in the 21-A proceedings in this court appearing on page 88 or commencing on page 88 of the transcript of proceedings held on August 11, 1947, and ending at page 138 of said transcript, and pages 235 to 247, inclusive, of the transcript of the testimony of Joseph G. White, and the further testimony of Mr. White— [64]



The Referee: Take one thing at a time, sir.

Mr. Horowitz: To which we object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial. We have before us in this particular proceeding certain pleadings and certain issues which are relevant to those proceedings; and we will object on that ground, that just general testimony is immaterial.

The Referee: Well, Mr. Weber, upon what ground do you think you can get those transcripts in evidence here?

Mr. Weber: Well, I offer in evidence the entire transcript upon the ground, No. 1, as evidence of the facts of which Mr. Horowitz had knowledge in his capacity as attorney and agent for Mr. White. This entire transcript was in his possession for a number of weeks prior to the time of the settlement or the substitution of attorneys Horowitz and Howard for Cannon & Callister. These transcripts were in his custody and control a number of weeks; and they are offered for showing the facts which Mr. Horowitz as the agent of Mr. White had knowledge of and is chargeable with.

We offer them upon the additional ground that the allegation of the amended answer filed by respondent White is to the effect that we had knowledge of—strike that.

They are offered on the additional ground as indicating the factual basis upon which the Trustee in Bankruptcy herein acted.

Mr. Horowitz: That is objected to upon the ground it—— [65]

The Referee: I will sustain the objection, Mr. Weber. If there is anything in those transcripts that impeaches any testimony given by Mr. Horowitz as to any lack of knowledge on his part as to matters that we are concerned with here, you should have confronted Mr. Horowitz with the transcript at the time he was on the stand.

Now, I think you gentlemen all ought to have some regard for the courts that have to deal with this problem. We have here a specific lawsuit and we are concerned only with the issues in that lawsuit. We are not trying the general case of Al Herd, bankrupt.

Now, as a judge I have a duty to listen to all of the evidence that is offered from the witness stand and to read all of the documentary evidence that comes in, and if you want to get those transcripts in evidence before I could decide this case I would have to go into my chambers and I would have to read every word of those transcripts; and one party or the other is going to be aggrieved by my decision here. That is certain. I can't decide it to please both of you; and the aggrieved party, because of the amount involved, whichever one of you it may be, may well take a review, and the entire record has to go up to the judge on review and the judge on review will have to read the entire record, including all of the exhibits.

In the first place, I don't think it is a proper way to get the evidence in. Secondly, I don't think you have [66] shown sufficient grounds to burden

and encumber this already lengthy record with the voluminous transcripts that you now offer.

The objection is sustained.

Anything else, sir?

Mr. Weber: Just one moment. I think we are through.

I would like to supplement one offer of proof that was made last week. We offer further to prove in connection with proceedings in the action entitled Quittner vs. White in the Superior Court that in that action Mr. White contended as a matter of defense and testified that he was not a partner and that he was a lender or creditor of Mr. Herd, and as evidence of that claim he introduced the promissory note of \$30,000.00 executed by Mr. Herd to Mr. White dated May 19, 1947, and which has been introduced in evidence here.

Mr. Horowitz: To which we object on the ground that it is incompetent, irrelevant and immaterial.

The Referee: Sustained. Proceed. Anything else?

Mr. Weber: We rest.

Mr. Horowitz: We rest, if your Honor please.

The Referee: All right, then, gentlemen, we are all through so far as the evidence is concerned. I have already ruled on all of these special defenses which are before us except the last one, and I have already said that I think that the ruling on that will have to be made on the same ground that the ruling on the case in chief may be made. [67]

I don't propose to go over any of those special defenses except to simply say this, that I don't want

anybody to feel that I have been unnecessarily harsh or technical or inelastic on these rulings on special defenses. If it may appear to same that I have been, I simply want to say by way of explanation that I have a fundamental philosophy that every person is entitled to a day in court in order to test any position that he has any reasonable ground to take; and that is my feeling here. Mr. White has the right to submit to this Court his claim that the Gibbons note is not enforceable against him in the hands of the Trustee in Bankruptcy of Al Herd.

Now, there isn't any question that Mr. Weber and Mr. Wellins were conscious of the fact that Mr. White might take that position, and so as good servants of the Trustee of the bankruptcy estate they tried to plan their strategy so that he would not be in a position to make any claims such as he is making here.

I do find as a matter of fact here that Mr. Gibbons did assign and transfer to the Trustee in Bankruptcy all of his right, title and interest and ownership in and to the White note to Mr. Gibbons, but I find that the attorneys for the Trustee in carrying out their plan of action deemed it advisable not to accept formally that kind of an assignment. They chose rather to take the assignment of the proceeds because they believed that from a legal standpoint they would [68] be better off simply to have the assignment of the proceeds rather than that which they were entitled to and which in effect they got or in fact they got from Mr. Gibbons, namely, the transfer of all of his interest in the note.

Now, we have this rather interesting development here. Although Mr. Weber and Mr. Wellins planned their case so that Mr. White couldn't claim an offset, nevertheless they now want this Court to hold that Mr. White nevertheless could have done that very thing because he knew all about it.

Well, I don't think, gentlemen, that Mr. White knew all about it. There has been a lot of evidence here pro and con, and we have had more lawyer witnesses here than I think we have had in many a case and many a day, and they haven't agreed as to some of the things that were said.

Well, now, I'm not going to pick and choose between lawyers who were on the stand, trying to find out definitely what was said and what was not said.

I don't know how much Mr. White himself knew, but Mr. White is a lay person and wouldn't necessarily know what rights he might have or what privileges he might have under a given set of facts. I am entirely satisfied that Mr. Horowitz and Mr. Howard did not understand that the Gibbons note was owned in toto by the Trustee in Banruptcy at the time of the summary judgment, and I say that for this reason, not so much because of anything that has been said on this witness stand but because of the fact that Mr. Howard and [69] Mr. Horowitz are now vigorously asserting this claim of Mr. White, and for some months past they have been giving notice of their intention to make such an assertion. They did, at least so I understand the record, make a vigorous effort to prevent a summary judgment by the filing I think of affidavits



and things of that kind. Certainly if they had understood at the time that the Trustee in Bankruptcy was the full and complete owner of this note that they were trying to contest they would have raised the issue that they have raised here.

Now, the only other conclusion that I could come to would be that they overlooked it, that it didn't occur to them, and I'm not going to do that. I am satisfied that if they understood then what they understand now that they would have urged the same issue there on behalf of Mr. White that they are urging here.

So now that disposes of the technical side of the case, and I don't want Mr. Wellins or Mr. Weber to get the impression that the Court is in any way critical of them. I'm not. I think they acted here as good lawyers. They looked at it purely from the legal standpoint. I don't think they did anything affirmatively with the intent to deceive Mr. White or his counsel. They were aware of the fact that Mr. White held this \$30,000.00 note and they planned their case so that he wouldn't have an opportunity to assert any offset against the Gibbons note. I want to make that very clear. [70] I don't criticize them. I don't think they should be criticized and they were indulging in legal strategy, for which they certainly should not be condemned.

Now, getting down to the merits of the situation here, I don't think that we can exactly call this Gibbons note an accommodation note for this reason, that Mr. White did get something in exchange for the Gibbons note. He got from Mr. Herd a prom-

issory note for \$30,000.00, and it is stated that the reason for giving the \$30,000.00 note was because Mr. White had signed the Gibbons note for \$5,000.00 and a note I think to the Morris Plan for \$25,000.00.

Now, I am not saying that there was any intention at all that that note should be payment of the debt from Herd to White, which debt arose by the giving by White of the \$5,000.00 note and the \$25,000.00 note. It was simply an evidence of that indebtedness, but nevertheless it is something. Now, what I mean to say is this: Assuming that Mr. Herd had gotten possession of the \$5,000.00 Gibbons note and owned it. He couldn't ordinarily enforce that against White if we make the finding, as we must make the finding from the evidence, that White received nothing for the Gibbons note except Herd's note. Herd couldn't enforce the \$5,000.00 note against White because when White gave Herd the \$5,000.00 note Herd thereupon became indebted to White. So the one would offset the other. But since Herd gave White a note, if White no longer owned that note, then Herd could [71] enforce the \$5,000.00 Gibbons note against White. I don't know if I make myself clear or not. If Herd had not given any kind of an evidence of indebtedness to White, and Herd had become the owner of the Gibbons note, if he sued White on the note White would simply plead the offset of Herd's indebtedness to him; but since Herd gave White a note before White could resist Herd's suit on the Gibbons note White would have to come forward with Herd's

note. If he had sold it, if he had disposed of it, if he had negotiated it, there would still be an obligation on the part of Herd. There could be no offset.

So that would be the situation as I see it, if Herd had gotten possession of the note.

Now we come down to the real situation. That never happened. Herd never became the owner of the Gibbons note, the note of White to Gibbons.

At the time of bankruptcy White held Herd's note for \$30,000.00. He had not disposed of it. He had not transferred it. He had not sold it. He had not negotiated it. He still had it. Gibbons had White's note for \$5,000.00. \$5,000.00 of the \$30,000.00 note from Herd to White was in consideration of White's note to Gibbons for \$5,000.00.

That was the situation at the time of bankruptcy. At the moment of bankruptcy, at the moment of the filing of the petition in bankruptcy, all of Herd's assets become vested in a Trustee in Bankruptcy who at that moment was unknown but [72] would later be appointed in the person of Francis F. Quittner; but I emphasize that which you all know, and that is this, that at the moment of bankruptcy, and that is defined to be the date of the filing of the petition in bankruptcy, which I think in this case was petition in involuntary bankruptcy; but regardless of that fact, at that moment title to all of Herd's assets then owned by Herd passed to the Trustee in Bankruptcy.

Among the assets which passed was a claim against Gibbons for usury. After bankruptcy the Trustee sued Gibbons on a number of counts. I im-

agine mostly—or most of the counts were based on usury. One of the counts was to recover the \$5,000.00 note, or \$5,000.00 White to Gibbons note, upon the ground that it was a voidable preference. A settlement of that litigation was made. In that settlement Gibbons paid Mr. Quittner \$3,000.00, or agreed to pay him \$3,000.00, and assigned his entire ownership in the White note for \$5,000.00.

Now the question is can Mr. White offset his liability on that \$5,000.00 note by his \$30,000.00 note? Let me put it this way: All of Herd's assets passed to Mr. Quittner, the Trustee. Gibbons held the White note. Herd had no right in it or to it at the date of bankruptcy. Supposing that Gibbons had purchased automobiles from the Trustee in Bankruptcy. Supposing at the time of bankruptcy Herd had 10 automobiles. Title vested in the Trustee. He sold them [73] to Gibbons. Gibbons paid for them with the \$5,000.00 note. Could White assert an offset against that note in the hands of the Trustee?

Now, Mr. Quittner did not sell tangible assets to Mr. Gibbons but he did have a cause of action against him for usury which he had acquired from Mr. Herd. In payment of that cause of action as a compromise Mr. Gibbons in part satisfied his obligation by transferring the \$5,000.00 note. Under the circumstances, can Mr. White offset?

The preferential portion of the Trustee's suit against Gibbons is interesting. Supposing that had been the only suit against Gibbons. Supposing usury wasn't in it at all, the Trustee simply sues Gibbons



to get back this \$5,000.00 note and succeeded. What would the situation then be? That would not be payment for an asset such as automobiles sold by Mr. Quittner to Gibbons. It would not be in payment of a cause of action owned by Quittner against Gibbons. It would be simply bringing back into the estate something that had been taken from the estate contrary to the laws as set down by Congress in the act of Congress relating to bankruptcy.

Well, in the first place, I don't think that Mr. Quittner would have succeeded because the Trustee I believe perhaps would have been unable to show any diminution of assets by the Gibbons note because let us say there was no other indebtedness on the part of Herd at the time, that is at the time he owed Gibbons \$5,000.00. After the transaction was [74] completed he didn't owe Gibbons anything any more but he owed White \$5,000.00. So it is very doubtful according to my view of it that Mr. Quittner could have—that Mr. Quittner as Trustee could have prevailed in a naked preferential action.

But in any event, the \$5,000.00 note and the \$3,000.00 in cash were not given by Gibbons to Quittner solely in satisfaction of the cause of action based upon a voidable preference. It was given to settle the entire lawsuit, and I don't think that the preferential end of it, for that reason and for the other reasons I have given can have much influence.

So now, gentlemen, I am going to take a recess and when I come back I want your views on this legal situation. Although Mr. White could have asserted the note in his possession as an offset



against a suit by Herd outside of bankruptcy on the Gibbons note, can Mr. White claim that same offset against a suit by Herd outside of bankruptcy on the same note under the circumstances through which the Trustee became the owner of the note.

Let's take the recess.

(Recess.)

The Referee: All right, Mr. Horowitz and Mr. Howard, have you any views on the matter?

Mr. Howard: If the Court please, we would like with your permission to address ourselves briefly to the question [75] of the accommodation phase of the case, if we may.

The Referee: Yes, certainly.

Mr. Howard: The Court will notice that the note which was received, the \$30,000.00 note which was received, is a non-negotiable note. It states on its face that any payments made out of the Morris Plan Bank reserve are to be credited on the note. The Court will recall the circumstances under which the note was given, that is White had given a note for \$5,000.00 to Gibbons and a note for \$25,000.00 to the Morris Plan Bank, and a few days thereafter had said to Herd that something—"If something should happen to you I have nothing to show for this transaction." Whereupon, Mr. Herd said, "Well, I will give you this note." The note was in effect a receipt, simply being evidence of the fact that White had accommodated Herd to the extent of \$30,000.00. The most that could be said would be the note was secured so that in any event Herd did not

pay White but just for evidence of the obligation of Herd to him.

The law is, if the Court please, that where security is given, not only a note but tangible physical assets to the accommodating party, that nonetheless it is an accommodation transaction.

In that connection I would like to call the attention of the Court to the case of *Brown vs. Volz* in 90 A. C., in the advance sheets, at page 973.

The Referee: What is that citation again? [76]

Mr. Howard: 90 A. C. A 933, *Brown vs. Volz*.

The Referee: Yes.

Mr. Howard: In that case a very old woman purchased a house and the seller was not willing to accept her obligation alone, so she had a friend of hers become an accommodation maker on a note that was given for the house. The friend loaned her credit, and the accommodation maker received in exchange an interest as a joint maker—I mean as a joint tenant in the property. The deed was made to both of them. She received a present one-half interest in the real estate to protect her in the transaction.

The Court states:

“As between the parties the status of defendant on the note was that of an accommodation maker,” as in this case.

They then go on to describe an accommodation maker as a party who signs an instrument as maker, drawer, acceptor, or endorser, without receiving value therefor and for the purpose of lending his name to some other person. “Without receiving

value therefor” has been construed to mean without receiving value for the paper, for the instrument itself. They may receive some value for lending their name as credit without destroying the accommodation nature of the transaction.

Again quoting, the Court says:

“Parol evidence is admissible to show that the maker of a note is, in fact, an accommodation maker and the evidence is limited to those cases in which there was no consideration [77] passing, for otherwise the maker could not be an accommodation maker under the statute. A loan of credit is the universal test of the character of accommodation paper.”

In other words, was there a loan of credit? The fact that an accommodation party has taken security for the loan of his credit does not prevent him from being an accommodation party, for in order to constitute a valid consideration the accommodation party must receive something else than the mere chance of not losing if he is called on to pay the instrument.

May I emphasize that? For in order to constitute a valid consideration the accommodation party must receive something else than the mere chance of not losing if he is called on to pay the instrument.

In the one case the accommodation party received a present one-half interest as a joint tenant in the real estate. In this case much less than that was received. The accommodating party received this document, a non-negotiable note, which was received by him from Herd with the understanding that was simply evidence of the transaction which had taken

place and not with the intention of changing the nature of that transaction.

If the Court please, the evidence is that White loaned his credit to Herd to the extent of \$30,000.00 without receiving anything other—anything for the loan of his credit. [78]

The Referee: I don't want to interrupt your train of thought, except this, in the security case that you mentioned the accommodation maker of course would have to give up the security when his obligation on the accommodation paper was extinguished; is that correct?

Mr. Howard: Yes.

The Referee: All right. Now, also, why do you call this note of Herd to White non-negotiable?

Mr. Howard: Because of the fact that on its face it is tied into a contingency upon another transaction. If the Court please, a person who became the recipient of this note for its face value, if there had been payments he would be subject to them because on its face the note shows that it is tied into a transaction with the Morris Plan Bank. It is not an unconditional promise to pay.

The Referee: All right, but supposing we go along that far with you, the note nevertheless is assignable, is it not?

Mr. Howard: Mr. White's interest in the note?

The Referee: Yes. Mr. White could have disposed of it?

Mr. Howard: Mr. White's right to receive the \$30,000.00, if he was obliged to pay the 30, was assignable.

The Referee: No, in any event, whether he paid the \$30,000.00 or did not pay the \$30,000.00, isn't this instrument which was received in evidence as Plaintiff's Exhibit [79] 29 an assignable instrument by White?

Mr. Howard: No, if the Court please, Mr. White had no rights under that instrument. That instrument was received by him, by Mr. White, as evidence of Herd's obligation to reimburse White in event White had to pay.

The Referee: No, it doesn't say so on its face.

Mr. Howard: Well, we have the testimony——

The Referee: No, I'm talking now about Mr. White's power to assign this instrument to a third party.

Mr. Howard: Well, the instrument means what the parties intended it to mean, and I contend that the evidence shows that this note was not to be sold or negotiated by Mr. White. It was simply evidence, in case something happened to Herd, that White would have some basis for making a claim for reimbursement, for reimbursement only for what he had expended, if anything, because of his accommodations to Herd.

Similarly, in the case of Brown vs. Volz, the parties to the note and joint tenancy interest could not have executed a deed conveying that interest. That would have been contrary to the understanding of the parties.

The Referee: But the deed would have been good, would it not?

Mr. Howard: The deed would have been good to



an innocent purchaser because nothing appeared on the record.

The Referee: And what about an assignment of this note?

Mr. Howard: There could be no innocent party because [80] of the notice on the face of the note, if the Court please. Mr. White had no power to sell this note without taking advantage, let us say, of some person. But the note itself was not negotiable because it is not an unconditional promise to pay the sum stated thereon and it would have been contrary to his understanding with Herd.

The Referee: All right, but if Herd had sued White on the Gibbons note could White have defended upon the note from Herd to White if White had assigned the note to somebody else?

Mr. Howard: You mean if White had breached his agreement and assigned the note to somebody else?

The Referee: Yes.

Mr. Howard: He would have no defense, having breached his agreement on the note; but the fact is that if Herd had sued White, equitably, having breached the agreement, the proceeds of that note would belong to Herd upon Herd's discharge of White's obligation to the Morris Plan Bank and Gibbons. In other words, the proceeds of that note would belong to Herd; if White contrary to his agreement sold it, they would belong to Herd.

The Referee: Well, let's shorten the argument a little bit.

Mr. Howard: All right.

The Referee: And let's assume for the purpose of the discussion that White was simply an accommodation maker on [81] the Gibbons note. What is the situation now that the Gibbons note is owned by the Trustee in Bankruptcy, who acquired it for a valuable consideration from Gibbons and who did not merely recover it from Gibbons but gave value therefor, to wit, the satisfaction of the claim of the Trustee in Bankruptcy against Gibbons on the ground of usury?

Mr. Howard: All right, in that connection let me say this: The law is—and this has nothing to do with Section 68 of the Bankruptcy Act because if we assume that White is an accommodation maker, as was the fact, then White is not urging an offset. White is then urging a defense to this note, and the question is can this defense be asserted against the Trustee.

The Referee: That is it.

Mr. Howard: Which is not determined by Section 68 having to do with offsets, which admit the liability sued on but which say there is another counter-liability.

In the question we are now discussing, there is no admission of liability and no offset tendered.

The law is plain that if Herd had the note and had purchased it from Gibbons, or had received it back from Gibbons in any way, and if the Trustee then came into possession of it, the Trustee couldn't sue an accommodation maker; and I cite in that—

The Referee: Well, now, wait. Let me see if I understand you. Are you saying now that if Herd

before bankruptcy [82] had the note, then his Trustee in Bankruptcy could not sue?

Mr. Howard: Yes.

The Referee: All right, let's go along with that; but that was not the fact.

Mr. Howard: No.

The Referee: Let's get down to the case we have here now.

Mr. Howard: All right. Now, instead of Herd having the note, the bankruptcy Trustee used Herd's assets to acquire the note. Now, does this make a different situation? If the Court please, Herd was obliged to pay this note to the accommodation maker. The agreement was, "I will give the note to Gibbons but when the funds are released from the attachment you will take up the note. I am lending you my credit. This is an accommodation. This is an accommodation note."

White was obliged to pay. The Trustee used Herd's assets to re-acquire that note. Does he become a purchaser of it? No. He extinguishes the obligation of the bankrupt because Herd's assets received by the Trustee were subject to Herd's obligations, one of those being to pay this note.

Now, if the Court please, I think an analogy will serve to illustrate the case. Let's suppose that White accommodated Herd by giving the note to Gibbons and Herd didn't go broke but he had funds, and Herd went to Gibbons and said, "Mr. Gibbons, I now have the \$5,000.00 that I owe you on [83] this obligation, I want to buy back Mr. White's note"; and Gibbons says, "Fine, give me the \$5,-

000.00, here is the note back.''' Would anybody in the world say that Herd then acquired the right to sue White on the note? No.

Now, is the situation different when the Trustee in Bankruptcy does that same thing? No, the situation is not different because Herd's assets were encumbered by the obligation to pick up this note. It is not as though the Trustee took assets which were not subject to this liability and paid them out when Herd didn't have to, thereby depleting the estate which was there for creditors. The assets which the Trustee had were subject to White's liability to pay this \$5,000.00 to Gibbons. The assets included this claim against Gibbons and were at all times, assuming this is an accommodation note, subject to the liability of Herd to pay that note.

The Referee: Well, now, let's elaborate on that. Do you say that Gibbons could sue Herd on the note?

Mr. Howard: Yes.

The Referee: Why?

Mr. Howard: Gibbons could sue Herd?

The Referee: Yes.

Mr. Howard: On the original note?

The Referee: On the White note.

Mr. Howard: On the \$5,000.00 note?

The Referee: Yes. [84]

Mr. Howard: Gibbons could have sued Herd or White. He had them both as obligors on that note.

The Referee: How do you figure that?

Mr. Howard: He could have sued White.

The Referee: Could he have sued Herd?

Mr. Howard: No.

The Referee: Then why do you say at the time of bankruptcy there was an indebtedness by Herd to Gibbons on the note?

Mr. Howard: Because Mr. White had the right to have that note paid by Herd at all times, at bankruptcy, before bankruptcy. The day that note was signed by White, Herd was the person who was liable to pay it as between White and Herd, and as far as the creditors are concerned, what difference did it make whether it was White who could have sued Herd or Gibbons who could have sued Herd? As far as the creditors are concerned, his assets were subject to this \$5,000.00 liability. When White signed the note to Gibbons that did not relieve Herd of a \$5,000.00 obligation. It simply was a transfer, as far as Gibbons was concerned, so that Herd instead of owing Gibbons owed White. White was willing to lend his credit to Herd. Gibbons was not. So Herd said, "All right, I will transfer that obligation to you. I will pay Gibbons. If I don't I will repay you."

So Herd owed \$5,000.00 at all times, and this transaction did not lessen Herd's indebtedness at all. It simply meant [85] that White became a surety to Gibbons for Herd's obligation. That is the nature of accommodation paper. I think it is perfectly plain if we had a balance sheet of Herd's liabilities before and after this transaction they would remain the same in both events. He got an extension of time, but the liability, the amount he



owed, was exactly the same: Let's assume he had no other obligations beyond these two of some \$30,000. He still owed the same amount.

And there is another angle of attack on this. That is the nature of the Trustee's action against Gibbons. This was an assertion of rights which were Herd's rights. Herd had them at that time, subject to all of his liabilities. The Trustee sued to compel Gibbons to disgorge assets of Herd which he acquired unlawfully. Forgetting for the moment the preference, the nature of this action was, "Gibbons, you have collected from Herd usurious rates of interest. You have received monies to which you are not entitled," including the very note in question. The Trustee compelled Gibbons to disgorge the fruits of his usury and they were given back to the Trustee. It was not a purchase and sale. It was not like the sale of automobiles because these were assets which Herd had all the time. The Trustee simply garnered in assets which Gibbons had gotten from Herd through usury, and he compelled Gibbons to disgorge and give them back. He took unto himself that which he had a right to as Trustee, these assets from Gibbons. [86]

Suppose, if the Court please, Herd had brought that action and had gotten this note back. Can it be said that he would have the right to sue Mr. White? No. When he got the note back it was in extinguishment of the note, not a purchase. And the same is true of the Trustee. The Trustee got back all of Gibbons' right, title and interest. Gibbons did not say, "This is a valid note, you will collect \$5,000

on it." He quitclaimed it. He said, "I have no right to it." He sold all of his right, title and interest. He said, "In your suit you claim that I had no right to get these payments. All right, I will give them back to you."

I submit that is not a purchase. You can think of the lawsuit as a medium in which there is a sale, but I say that is an improper conception of that lawsuit. It was a right to receive back things to which Gibbons had no title, and Gibbons said, "I'm not giving you this for \$5,000.00, I'm not negotiating it to you, I am recognizing I had no right to it and all of my right, title and interest I release to you.

Under those circumstances the Trustee did not buy this note at all. The Trustee received back a note which Herd had a right to receive back. Herd's assets at all times were subject to this obligation to White, and they remained so in the hands of the Trustee; and it is submitted, if the Court please, that this Trustee got this note in law the same as though Herd had filed the suit and had it in his possession [87] at the time of bankruptcy. The Trustee simply did what Herd had a right to do. The situation is the same as though Herd had filed and settled the lawsuit, and nobody in the world would say that Herd, the accommodated party, by so doing had the right to sue White any more than Herd would have the right to go to Gibbons, pay the \$5,000.00 note to Gibbons, and then turn around and sue White. He had no right to do that. He had the right, as Mr. White understood, to the extinguishment of the security to that extent. When Herd

paid the \$5,000.00 he had a right to have the \$30,000.00 note reduced by \$5,000.00.

That is not a negotiable instrument. It was intended that White would hold that as evidence of Herd's obligation; and I submit, if the Court please, that the \$30,000.00 note was not consideration for the instrument, was not consideration for the instrument. The law provides that an accommodation maker or party is one who receives no consideration for the instrument. He may receive consideration for lending his credit but he may not receive it for the instrument. White received no consideration for the instrument. He received nothing. He received a piece of paper which was evidence of his agreement with Herd, a non-negotiable piece of paper which when Herd paid the debt he was to reduce by \$5,000.00, and the Trustee is in no better position than Herd by reason of the fact that Herd at all times was subject to this liability, and his assets were subject to this liability [88] at the time of bankruptcy, and the bankruptcy Trustee simply exercised Herd's rights in the matter, not some later acquired rights.

Now, to address myself to the other point. Now we come to the question of offset. In this question it makes no difference whether White was an accommodation maker or otherwise. We will assume that White is obligated on the \$5,000.00 note to the Trustee, and in connection with offset the liability is admitted but it is claimed there is another different claim which is tendered as an offset. The tendered offset in this case is a \$30,000.00 note.

Under the Bankruptcy Law, Section 68, the right of offset is preserved to creditors of the bankrupt and to the bankrupt against claims. The requirements are that the claim which is tendered as the offset must be a claim that is provable in bankruptcy. I don't think there is any doubt as to the provability of the \$30,000.00 note in this case to the extent that Mr. White has paid on the obligations that he acted as accommodation for Mr. Herdon. The only question, and a serious question in this case, is are the debts mutual? That is, it is the Trustee suing White on an obligation which is owed in the same right and in the same capacity as the obligation which White is tendering as an offset.

Now, in some cases it has been said that the date of bankruptcy is a cutting-off point and that a subsequently [89] acquired obligation is therefore not mutual with an obligation that existed before the bankruptcy.

If the Court please, it is submitted that these statements are made in cases where that is true, but that it cannot be reasoned that that is true in every case. I would like to point to some authority on that to the Court.

The Referee: You mean new ones?

Mr. Howard: It is nothing in addition to what we have already furnished in our brief.

The Referee: Oh, well, I have read all that.

Mr. Howard: All right.

In this case, if the Court please, Herd goes—or rather Gibbons—let me put it this way: If the Court please, we are admitting and assuming White is

obligated to the Trustee on the \$5,000.00 note. The question then is is the \$30,000.00 obligation a mutual obligation—in other words, one which properly counteracts the other. I call the attention of the Court to the fact that these two obligations arise out of the very same transaction, and the doctrine of set-off is an equitable doctrine, the purpose being that a person is not required in bankruptcy to extend more credit to the bankrupt than he would have under normal conditions. It is an equitable doctrine to do the fair thing, and the Courts recognize that in some cases this means that a creditor who has an offset will receive more proportionately on his claim than a creditor who doesn't have an offset, but [90] that is fair because this creditor dealt with the bankrupt on such terms that the offset existed before bankruptcy, your Honor.

Then comes the question, was White in a situation before the bankruptcy whereby if there had been a suit on the \$5,000.00 note by Herd he could have tendered the \$30,000.00 note. Now, we can't confuse that with accommodation because if there is accommodation then the question doesn't arise. It is a defense. I am assuming now White doesn't have the defense of accommodation in a suit by Herd, that he received some independent compensation. But let's assume that Herd before the bankruptcy had acquired this note in any fashion, in any fashion, from Gibbons or from a subsequent assignee of Gibbons. Could Herd have sued White? Yes. Could White have offered the offset? Yes. There is nothing more fundamental in law, and I am quoting



from cases which the Court will agree with, I am sure, than that the accommodated party cannot sue the accommodating party. He cannot be a holder for value.

There is a \$30,000.00 obligation of Herd to White. If Herd acquires the \$5,000.00 obligation White could urge the offset. He could have urged it before bankruptcy. White was unwilling to go beyond that point before bankruptcy and the Trustee cannot convert that situation into a different situation by claiming the debts are not mutual; and in this connection I have assumed that the Trustee acquired it after [91] bankruptcy. As I said in the argument before, this is not the fact. The Trustee simply garnered in assets which Herd had. The Trustee was asserting no new rights in connection with the Herd suit. He was asserting Herd's rights and Herd's rights were subject to this \$30,000.00 note.

Now, the Trustee said in settlement, "Yes, these are the rights which I am willing to take, these are the very rights I am suing for." He got less than that, but these were still the rights that Herd had at the very time of bankruptcy, and Herd's right to bring that lawsuit was at all times subject to White's rights against Herd. This was not an after-acquired asset.

The Referee: All right, what do you gentlemen say? I'm not very much impressed with the straight out and out defense of offset. So let's not have any argument on that. Let's go back to the accommodation feature of it. What have you to say on that?

Mr. Wellins: On the accommodation feature?

The Referee: Yes, the argument that Mr. Howard made.

Mr. Wellins: I believe that he made the first part of his argument while I was at the library getting a few additional books, and therefore I did not have an opportunity of hearing all of it. I therefore would prefer that Mr. Weber reply to that.

The Referee: All right.

Mr. Weber: The question of accommodation maker presents [92] one problem because of the state of the record involving the admission of certain evidence which the Court excluded. Consequently, in making this argument I am perforce limited to that portion of the record which has been admitted in evidence.

The Referee: Well, I think for the sake of the argument on the legal question we may just as well assume that it was an accommodation instrument. Perhaps I confused you gentlemen by saying that Mr. White could have negotiated the note and he could have assigned it, but the fact is he still does have the \$30,000.00 note and there isn't any question in my mind at all but what Mr. White did not receive anything of value for the note that he signed in favor of Mr. Gibbons, and I am sure that it was not the intention, as I already said, that Herd would discharge his corresponding obligation to Mr. White by giving him this instrument. It was simply an evidence of the transaction and of the liability on the part of Herd.

So for the sake of the legal question involved,

let's assume that it was a straight out and out accommodation instrument.

Mr. Weber: Well, let's assume it was a straight out and out exchange of promissory notes. Would that be in accord with the present state of the record?

Mr. Horowitz: No.

The Referee: Well, let's see what he has to say about [93] it.

Mr. Weber: In that connection I would call the Court's attention to the case of Mellor vs. Rideout, 83 Cal. App. 621, at page 626.

The Referee: Yes. What does that say?

Mr. Weber: "The correspondence," and I am quoting, "in date, amount and interest warrants the inference that the instruments were cross-notes," citing the case of Mutual Loan Association vs. Brandt. "The rule is well established that a promissory note given by the maker, in exchange for a note given by the payee, is for a valuable consideration and not an accommodation, although made for the mutual accommodation of the parties."

That same case is referred to in a note in A. L. R. and in Corpus Juris, and in support of that same principle of law we would like to cite to your Honor 11 Corpus Juris Secundum, C. J. S., 397, and the cases which are therein cited, specifically Notes 19 and 20, some of which I have read and briefed here, and I would like to refer to them very briefly, and for the most part they uniformly announce the rule which I have adverted to and as is exemplified by the case of Mellor vs. Rideout. Where

promissory notes are exchanged each is a valid consideration for the other and the transaction cannot be considered as being an accommodation note.

Now, let's assume for the sake of the argument that [94] there was an intention of some kind on the part of White to accommodate Herd. Herd owed no obligation in law to White until White in some way had to respond legally in the way of liability upon that accommodation note. In other words, White had no recourse against Herd until he was obliged to respond in the way of payment or in an action to the payee or holder of the note. Notwithstanding that phase of it, Herd gave White his own promissory note in the sum of \$30,000.00 payable on a day certain in December of 1947, for a specific amount of money, notwithstanding the fact that at the time of the delivery of that note White had not yet been called upon to pay this alleged accommodation note; and treating it as a pure exchange of notes, the Mellor case and the many cases cited in the Corpus Juris notes which I have referred to establish the rule that the exchange of promissory notes in that fashion does not spell out an accommodation transaction, and that is so, your Honor, though one or both of the notes should turn out to be worthless. In other words, one will not be heard to say, "But the note you gave me in exchange turned out to be worthless."

Another case expounding that rule which is cited in Corpus Juris Secundum and which I have seen

cited frequently in many of the cases is *Farber vs. The National Forge & Iron Company*, 140 Indiana 54, in which the language used is as follows:

“Nothing is better established than that a promissory [95] given by the maker in exchange for a promissory note given by the payee is for a good consideration and is in no sense an accommodation note although made for the mutual accommodation of the parties.”

And it goes on to add:

“This is true although the note given in exchange is worthless.”

Another case of similar purport—and by the way, I have limited myself to the courts of last resort in all of these States. I have taken no intermediate courts of appeal.

Another case is *Merrill Trust Company vs. Brown*, 122 Maine 101, at page 105, and the Court reasons and holds as follows:

“The law is well settled that cross-notes, bills or checks though made for the accommodation of the parties are not accommodation but business paper, provided there is no restriction on use or negotiation, the one note, bill or check being a good consideration for the other received in exchange. Moreover, the transaction being complete at the time of the exchange, the question of original consideration is not affected by subsequent events, such as the failure of one of the parties to pay his note when due.”

The Referee: Well, let me stop you there. I don't think I can make that finding. I don't think



this was an exchange of promissory notes. In the first instance Mr. White [96] accommodated Mr. Herd by giving a \$5,000.00 note to Mr. Gibbons and a \$25,000.00 note to the Morris Plan Bank, and then as an evidence of the transaction a note was given by Mr. Herd to Mr. White. I couldn't call this an exchange of promissory notes. It was an accommodation transaction.

Mr. Weber: Well, such a finding in view of the state of the record with respect to the contemporaneous nature of the three transactions, namely, the note of the Morris Plan Bank of \$25,000.00 and Gibbons of \$5,000.00, and the contemporaneous note of \$30,000.00 of the bankrupt to White, could hardly support the contrary finding that they were cross-notes, because according to the testimony of Mr. White they were all related to each other, and the amount of \$30,000.00, if I recall the testimony of Mr. White correctly, was that the amount of \$30,000.00 was computed and arrived at by taking the \$25,000.00 and the \$5,000.00.

The Referee: Yes. There isn't any question but what Mr. White would have to produce the \$30,000.00 note before he could claim that Herd could not enforce the \$5,000.00 note, but nevertheless I think it was not intended to be an exchange of promissory notes in the sense that those cases treat with that kind of a situation. I think it was essentially, and I shall so find——

Mr. Weber: On the question of findings, or that particular finding, I direct the Court's attention specifically to the language in the California case

which I have already [97] cited, *Mellor vs. Rideout*, page 626:

“The correspondence in date, amount and interest warrants the inference that the instruments were cross-notes.”

The Referee: I know, but you don't find findings of fact in law books. You have to make findings of fact from the evidence before you, and that is what I find from this evidence here, that this was not intended as an exchange of promissory notes.

Mr. Weber: Well, that brings us to the next phase of that same question, and as I say, the state of the record presents something in the way of difficulty in the matter of argument. The matters which are embodied in the offers of proof, if they were considered as part of the evidence, we would then have open the avenue of argument to show what additional consideration inured to Mr. White in connection with these transactions. For example, if it be true——

The Referee: Well, I will stop you right there because further argument isn't going to help us on that proposition. All your offers of proof tended to show that Mr. White anticipated some kind of a business relationship with Mr. Herd, anticipated that he would acquire some kind of an interest in a business with Mr. Herd, from Mr. Herd or otherwise, but I listened very carefully to all of your offers of proof and there wasn't a single offer of proof that Mr. White received anything except maybe that your offers of proof indicated that he received a partnership interest, but that has [98]

already been adjudicated, that he did not.

Mr. Weber: I would like to——

The Referee: No, I haven't time, Mr. Weber.

Mr. Weber: I would like to state what the Court held to the contrary.

The Referee: I'm sorry.

Mr. Weber: Does the Court decide that argument be shut off at this point?

The Referee: Mr. Weber, please don't become irritated with the Court. The Court has the final responsibility here. The Court has its mind made up on that point and the Court will not have any further argument on that point.

Mr. Weber: May we go on to the next point?

The Referee: Yes, you may go on to the next point.

Mr. Wellins: Your Honor, I would like to address myself to this Section 68.

The Referee: No, there is no need to go into that. I wouldn't go along with counsel on his argument on a setoff. The thing that bothers me here is the accommodation feature of this transaction, Mr. Howard's argument that the Trustee was simply discharging a debt that Mr. Herd had anyway, and it is his further argument that the Trustee simply got back something that Mr. Gibbons was not entitled to keep, namely, these usurious payments which had been made. Mr. Howard's argument by inference is that the \$5,000.00 note represented usurious payments which Mr. Gibbons was not privileged [99] to keep. What about that?

Mr. Wellins: Let me reply to that in particular.

The Referee: Yes.

Mr. Wellins: The law says if a man receives usurious interest, that that is a wrongful act and that he is liable in damages to the party who has thus been wronged; and the law will go a step farther than that. It is not merely an inadvertent act of breach of contract. It is a tort case, and that the party committing the tort by way of collecting usurious interest is deemed as a matter of law to hold that subject to a trust in favor of the party who has thus been wronged.

Now, on August 6, 1947, when Mr. Herd had his petition in bankruptcy filed, involuntary petition, what was the status in regard to the matter that your Honor has just posed? The usurious interest had been charged. A cause of action existed in Herd for the recovery of the usurious interest. Mr. Gibbons as the one who had charged that interest was deemed as a matter of law to hold it subject to a trust and to be obliged to return it to Mr. Herd.

When the Trustee was appointed he succeeded to the rights of Mr. Herd to get that usurious interest back from Mr. Gibbons. That is the source of the Trustee's title here. That is the right through which he derives his cause of action against Mr. Gibbons as expressed in the Federal Court suit.

Now, on the date of the filing of the involuntary petition, [100] what was the status in regard to the \$5,000.00 note, what were the mutual rights and duties of the parties? A note had been given, Mr. Gibbons still held it, it had not been paid, and subsequently—well, leave out “subsequently.” It had not been paid.



As to the \$30,000.00 note, what was the situation? That, too, had been given by Herd to White and White held it. He still held it on the date of the filing of the petition and it, too, remained unpaid.

Now, considering all these matters together then, on the date of the filing of the petition the Trustee under Section 70 of the Bankruptcy Act succeeded to all of the rights of Mr. Herd, including the cause of action that Mr. Herd might have asserted against Mr. Gibbons for the usurious interest. The Trustee compromised that action and obtained possession of the funds on the \$5,000.00 note. I do not discuss at this moment, because I deem it immaterial to this part of the argument, the exact manner in which the money was obtained. Suffice it to say that the Trustee compromised the action in the Federal Court and ultimately obtained some \$6220.00, which was the total proceeds of the Gibbons note. That occurred after bankruptcy, after the filing of the petition.

If Mr. Howard is taking the position now that he waives the offset feature of this, then he must only be here on the accommodation defense. It could not be ascertained from [101] his pleadings and points and authorities heretofore filed that such was his position, for he referred there to offset and treated his points and authorities as a reply to the fact that an offset should be allowed according to his position. Now he says in effect, "I shall for the purpose of this argument waive the matter of offset and consider only the matter of defense." They



urge here as defense, by way of defense, that this was an accommodation note.

Now, the Court will not shut its mind to the fact that the \$30,000.00 note existed. It was never canceled. It was never surrendered. It was never paid, either. There has been no attempt by Mr. White to show how or why he can waive the \$30,000.00 note, and we submit that if he succeeds at all in this transaction it can only be by urging the \$30,000.00 note, and as a corollary of that, if he succeeds at all it can only be by urging the rights of offset under Section 68.

However, by referring to the date of the petition, we submit two things are immediately clear. No. 1, that on that date the Trustee did not have any rights in regard to this \$5,000.00 note. The Trustee had not yet been appointed, had not begun any negotiations, had not made any compromise. It was December, 1948, when the money was finally received in this matter, December 14, 1948, many, many months after the date of bankruptcy.

Now, furthermore, on the date of bankruptcy these obligations which we have discussed were not in the same [102] right, and it is a prerequisite of any claim asserted by Mr. White that he establish that the obligation on the \$30,000.00 note was in the same right as the Trustee's claim here. The Trustee's claim was the effect, or the result, rather, of a compromise with Gibbons of a claim arising principally out of usurious interest charges.

To clarify the matter, let's suppose that Mr. Gibbons had a lot of cash on hand and didn't have

to pay out the Trustee by way of giving him part cash and part assignment of proceeds or recovery in a lawsuit. Let's say that Mr. Gibbons had given the Trustee on the date of the compromise the sum of \$8,000.00 in cash. Could Mr. White now assert any claim to the \$8,000.00 or any part of it? Absolutely not. That claim arose out of the Trustee's compromise of a cause of action for usury and other related matters and it became part of the assets of the estate. If Mr. White wanted any money in this estate, his only recourse could have been at one time to file a claim and if the claim were allowed then he could get his share of the dividends if there were any funds out of which to pay him his pro rata dividend; but to that fund he had no way of asserting any claim, either by intervention or garnishment or anything of that sort. That became an asset of this estate.

Now, what the Trustee has done is substantially the same thing. The Trustee has succeeded to a portion of Mr. Gibbons' money in a direct cash payment and a portion of [103] Mr. Gibbons' money that Mr. Gibbons would have received if he had merely let the garnishment against him become effective.

So we have claims arising in different rights. Mr. White's claim against Herd is not necessarily the same as he can assert against the Trustee, and as a matter of fact he can still assert any claim he has against Herd, but the claim he had against Herd on the date of bankruptcy and the only claim he could have asserted on that date against the estate was a claim under the \$30,000.00 note, and even then

White could not have succeeded in having allowed to him a \$30,000.00 claim because as of that date he had not given \$30,000.00 consideration for it and there would have been a partial failure of consideration. That is why in Section 68 they refer wisely to a portion of 57G of the Bankruptcy Act by saying if you have a claim but it is not liquidated, as indeed the claim of White was not liquidated on that date—the \$30,000.00 was his potential maximum but in order to determine the amount it would have to be determined how much he had paid out and how much his security was worth by way of those reserves, to determine what the net was he had advanced to Mr. Herd; and according to the evidence which counsel has stipulated to here Mr. White has never had his \$30,000.00 note processed through this court to determine the net amount that may be owing by the estate of Al Herd, bankrupt, by reason of that \$30,000.00 note. [104]

So that on the date of bankruptcy we have an unliquidated note arising in a different right than the proceeds of the claim out of which the Trustee obtained his money. The Trustee having compromised a claim for usury obtained a total of \$8,000.00, all of which was obtained and all of which was done after bankruptcy, and none of which existed prior to the date of bankruptcy. On the date of bankruptcy there were no mutual claims or credits. Mr. White if he had anything had a direct personal debt to Al Herd—I mean from Al Herd, by reason of this \$30,000.00 obligation or by reason

of any balance of a net obligation owing on it after he paid what he owed.

The Court in this connection might be aided by the authority of *McDaniel National Bank vs. Bridwell*, 74 Federal (2nd) 331. The analysis of the principles about which we are speaking was clarified there. The Court, after quoting Section 68, states as follows:

“From the wording of this subsection”—that is Subsection 68A—“it is evident that before a creditor may enjoy the set-off principle against the bankrupt’s assets, two essential elements must be established: (1) two debts must exist, one of the creditor and one of the bankrupt’s estate; (2) these debts must be mutual, that is, the creditor’s debt must be owed to the estate of the bankrupt and the estate’s debt must be owed to this creditor. When these conditions are fulfilled the statute applies with [105] full force and may be taken advantage of. If such conditions are not fulfilled and the required mutual-ity is lacking, set-off is impossible under the statute.”

Well, of course, the final conclusion is a necessary result of the first two.

Now, were there two debts existing on the date of bankruptcy? Not in this case.

The Referee: Now, Mr. Wellins, I don’t think we need any argument on the question of set-off. The problem is whether or not the Trustee in Bankruptcy stands in the shoes of the bankrupt. The bankrupt could not have collected the note from Mr. White provided Mr. White had not assigned the \$30,000.00 note, and he had not. So that is

where we stand, and our problem is whether or not the Trustee is under the same limitations that Mr. Herd would have been under if he had acquired the note.

Mr. Wellins: Your Honor, I would like to speak on that point.

The Referee: Yes, let's get into that.

Mr. Wellins: We submit to the Court that the Trustee stands in the position given him under Section 70 of the Bankruptcy Act, and that he has as of the date of bankruptcy all the rights of a judgment creditor as well as all the rights of the bankrupt, and it is our position that the Trustee may, and is indeed under the law obliged to, take that position which most favorably inures to the benefit of [106] the bankruptcy estate even though the position of a judgment creditor whom he represents may be completely antagonistic to that of the rights of the bankrupt which he also represents for the purpose of his exercising title over the complete assets of the bankrupt.

On August 6, 1947, when this involuntary petition was filed, Mr. Quittner succeeded to the rights of Al Herd with respect to the recovery of usurious interest against Mr. Gibbons, and he purchased and compromised the claim—strike that. He compromised his claim against Mr. Gibbons by reason of his capacity as a representative of the creditors of Mr. Herd as well as his other capacity. He is entitled to rely upon his capacity as a representative of creditors in connection with his activities in gathering the assets of this estate from Mr. Gibbons and from other sources. So that it does not necessarily



follow that although Mr. White could have sued Mr. Herd he could also have sued the Trustee in Bankruptcy.

I think we have some authority that will be of help on that point.

Well, the case that I cited, *McDaniel National Bank vs. Bridwell*, is of aid on that point, your Honor, and in that case the Court said:

“Appellant was a creditor of Case and he was its debtor because of the note, and Hattie Winslow was a creditor of the bank, and it was her debtor because of the certificates [107] of deposit. It owed Case nothing. Case had parted with title to the money represented on the certificates. There was no mutuality of debts and credits between Case and the bank when the petition was filed, which is the time when the right of set-off must be measured. At that time by virtue of law there came to the Trustee in Bankruptcy the right to recover the certificates of deposit for the estate. This right was exercised and bore fruit.”

The Referee: All right, Mr. Wellins.

Mr. Wellins: And then going on in that same vein.

The Referee: Thank you. That will be all for your side for the moment.

Now, Mr. Horowitz and Mr. Howard, let me ask you a couple of questions here. You know that under Section 70 the Trustee is vested with title to property of the bankrupt, including under Subdivision 5 of Paragraph A of Section 70, “property, including rights of action, which prior to the filing

of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.”

Now, if Mr. Herd prior to bankruptcy had transferred his cause of action against Gibbons for usury and the transferee in settlement of that cause of action had taken over the White note, or if a creditor had levied upon Herd's cause of action against Gibbons and had acquired it at judicial [108] sale, or had made a settlement with Gibbons and in that settlement had received the White note—in either of those situations could the note have been enforced against White? What do you say?

Mr. Horowitz: Well, I'm not sure, excepting I would like to make some suggestions that may clarify our position if the Court will permit me.

The Referee: All right.

Mr. Horowitz: And I think it will be of help.

The whole question of accommodation maker and bills and notes stems from the Law of Merchant which is probably as early as the English Common Law, and certain rules have developed with respect to that, and the theory behind accommodation maker is that if by any chance the note which was signed by the accommodation maker gets into the hands of the accommodated party, by whatever means, the accommodated party cannot recover because it would be unjust, it would be inequitable so to do. It just lends itself to our common sense and to the wisdom of the past.

Someone has said that the Common Law or the

law that has withstood is the congealed wisdom of the ages.

Now let's consider the actual facts that we have in this case. We have a situation that doesn't admit of doubt that Mr. White was an accommodation maker on that note. Then we have another situation which is admitted, that the Trustee in Bankruptcy had brought suit against Mr. Gibbons in [109] connection with claims of usury and with claims of a preference. At the same time that that was done, we had another lawsuit pending. That lawsuit was the one of Gibbons against White on that same \$5,000.00 note.

Now, there you have the situation; and in connection with that suit a defense had been raised. It is entirely possible in any litigation for a defendant to at a later time ask leave of court to file other and additional defenses, if any such additional defenses arise.

Now, let's consider the fact that this Bankruptcy Court had to consider and that the Trustee in Bankruptcy had to consider at the time he was negotiating with Gibbons for settlement of the suit of the Trustee in Bankruptcy against Gibbons. The claim was for a considerable sum of money, and the negotiations went on, and your Honor is familiar with the fact that the demand was for a greater amount than was finally settled for. That is the reason it was necessary to ask leave or to have a hearing to determine whether or not the claim for a greater sum should be settled for a lesser sum; and when the Trustee in Bankruptcy accepted the settlement,

what did he accept? First, he took \$3,000.00 in cash; and second, he took all of the right, title, and interest of Gibbons in that note.

The moment you couch an instrument in such language, "all to the right, title, and interest," you know that there is or may be certain defenses which will diminish the value [110] of that. The Trustee in Bankruptcy knew when he took that note that that note was an accommodation note, and when that accommodation note finally was transferred to the Trustee in Bankruptcy it was with knowledge that it was an accommodation note, and if it was an accommodation note, that is insofar as Mr. White was concerned, that he could set that up. They took that as a risk with their eyes wide open in a desire to settle that other lawsuit. There was no guarantee. They weren't taking that note for \$5,000.00 because they were buying or they were acquiring only all of the right, title, and interest. If it was to have been more than all of the right, title and interest, there would have been some guarantee of its producing a certain sum of money.

Now, it just makes good common sense, it makes an equitable situation, and this is a court of equity and this is an equitable proceeding to quiet title here—it makes good common sense that the Trustee in Bankruptcy under those circumstances not collect a note where the payor of that note was an ac-

commodation maker for the bankrupt in this estate. It isn't a case of being cute as far as procedure is concerned to figure out, "Well, we will do it this way and keep him out of a defense in the Superior Court rather than do it another way where the matter can be settled out in the open and the rights determined." That was taken with their eyes open, and they tried to figure out some way of circumventing the situation that existed. [111]

It just doesn't make common sense, in my opinion, to say that when you take an accommodation note under those circumstances, to say, "Well, for this purpose we will be like the Poobah or the Mikado, for some purposes we represent Herd and for other purposes we don't." They represent Herd. They stand in the shoes of Herd, and when they acquired that note with knowledge and while the lawsuit was pending and before a motion for summary judgment was made, and in the light of all the testimony that had been taken in the case, with knowledge of the facts, they took it knowing that Mr. White should have the right to claim that defense; and that is all that Mr. White is doing here. You can't say, I don't think anyone can say, that the Trustee in Bankruptcy's eyes were closed or shut off or his view was dimmed when that settlement was made, and it is simply a situation where the accommodation note finally found its way into the hands of the accommodated party, and once an accommodation note gets into the hands of the accommodated party, by whatever means it gets into his hands, in equity and in good conscience he should not collect on that note.



The Referee: Anything further?

Mr. Howard: Could I just briefly answer the question of the Referee in connection with the attachment creditor?

The Referee: Yes.

Mr. Howard: In the first place, the right to complain about usurious treatment is not an assignable right. Secondly, [112] any attaching creditor gets only what the debtor had, and the debtor here had no right to enforce the note against Mr. White; and thirdly, the Trustee took this not as an attaching creditor but in assertion of Mr. Herd's rights.

The Referee: Well, it would seem that if title vested in the Trustee to Herd's cause of action against Gibbons, that under this Subdivision 5 of Paragraph A it must either have been transferable by Herd or it must have been subject to levy by a creditor, because those are the two ways that a Trustee usually acquires title.

All right, gentlemen, is there anything further now?

Mr. Horowitz: Nothing further, your Honor.

The Referee: I don't think, gentlemen, that it was the intention of Mr. Gibbons merely to give up whatever he, Gibbons, might be able to recover on the White note. I don't think Gibbons had in mind that he was in any danger of not being able to get a judgment for the entire note. In the hands of Gibbons Mr. White had no defense. He owed the note. Gibbons had given a consideration for the note. He had credited the account of Herd with

\$5,000.00 in exchange for or in reliance upon the White note.

Now, I appreciate what Mr. Horowitz says, and Mr. Howard also, that usually when you make a conveyance of right, title and interest it is a suggestion that there is something wrong with it, that there is some defect in it, some flaw of some kind, either present or future, but I don't believe [113] that the use of that term in these papers which are here in this case relating to the Quittner-Gibbons settlement—I don't believe that was put in there with anything like that in mind. I am afraid it is just an incidental use of the phrase because as I point out Mr. Gibbons certainly could have collected that note from Mr. White, and the judgment proves that. The judgment of the Superior Court I think was even a summary judgment. There was a cause of action on the face of the pleadings. Mr. White had no defense unless he would have the defense which is urged here, but certainly the defense would not have been available against Gibbons.

So I am of the opinion that the Gibbons note in the hands of the Trustee in Bankruptcy, having been secured under the circumstances which have been brought out in the evidence here, is an entirely different sort of an instrument than it would have been in the hands of Mr. Herd. In the hands of Mr. Herd it could not have been enforced against Mr. White unless Mr. White should have been unable to produce the \$30,000.00 note which Mr. Herd gave to him. By that I mean to say if in the mean-

time Mr. White had assigned that instrument to someone else, then I think probably even Mr. Herd could have enforced the Gibbons note against Mr. White.

Judgment will be for the Trustee.

I assume you want findings, gentlemen?

Mr. Horowitz: Oh, yes, indeed.

The Referee: All, right, you gentlemen prepare findings. [114] Now, you have got quite a job here. You have got all these defenses to make findings on, but remember as to those the findings of fact are in favor of the other side.

The usual practice here is for the prevailing party to prepare findings and conclusions and order, deposit the original and one copy with the Referee, furnish counsel on the other side with a copy, or two copies if you would like to have it. We hold the original here for 5 days without acting on it so as to afford the aggrieved party an opportunity to make any suggestions that you want with respect to changes in the findings and conclusions and order. Or do you want more than 5 days?

Mr. Horowitz: Well, I think 5 days, unless there is some question. We are fortunate in having a transcript, so that there should be no question on the findings.

The Referee: Well, suppose we leave it this way: Mr. Wellins or Mr. Weber will advise you of the date upon which they are depositing the original with me. If you gentlemen want more than 5 days if you will give me a ring on the telephone that I am sure will be agreeable to the other side.

Mr. Weber: That is right.

The Referee: But let's fix it in the first instance at 5 days. [115]

Certificate

I, H. A. Singeltary, hereby certify that on the 31st day of January, 1950, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Benno M. Brink, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 16th day of May, 1950.

/s/ H. A. SINGELTARY,  
Official Court Reporter.

[Endorsed]: Filed May 16, 1950.

[Endorsed]: Filed U.S.C.A. June 22, 1950. [116]

## TRUSTEE'S EXHIBIT No. 2

In the District Court of the United States for the  
Southern District of California Central Division

In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

## CERTIFICATE OF MAILING

I, Bessie Kyle, a regularly appointed and qualified clerk in the office of Benno M. Brink, Referee in Bankruptcy of the District Court of the United States for the Southern District of California at Los Angeles, hereby certify;

That on the 6th day of May, 1948, I personally, pursuant to instruction from said Referee in Bankruptcy and in the performance of my duties as such clerk, deposited in the U. S. Post Office in the City of Los Angeles, true copies of Notice of Hearing Trustee's Petitions to Compromise Controversies in the said matter, a copy of which is hereto attached; that said copies of said notice, so deposited, as aforesaid, were each enclosed in an envelope bearing the lawful frank of the said Referee in Bankruptcy and that said envelopes were respectfully addressed to each of the following: to each of the creditors in said matter at their respective addresses as they appear in the list of creditors of the said bankrupt-debtor or as afterwards filed with the papers in the case by the creditors; and to the



said bankrupt-debtor at his last known address as appears in said matter; to the said bankrupt-debtor's attorney, if any, at his address as filed by him with the Court; to the trustee in said matter and to his attorney, if any, at their respective addresses as filed by them with the Court; to the Commissioner of Internal Revenue, Washington, D.C.; Collector of Internal Revenue, Los Angeles, California; County Assessor, Los Angeles, California; County Tax Collector, Los Angeles, California; Department of Employment, Collection Unit, Unemployment Reserves Commission, State of California, Sacramento, California; Board of Equalization, State of California, Sacramento, California; and Franchise Tax Commissioner, State of California, Sacramento, California.

/s/ BESSIE KYLE,  
Clerk.

In the District Court of the United States for the  
Southern District of California Central Division  
In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

BANKRUPT.

NOTICE OF HEARING TRUSTEE'S PETI-  
TIONS TO COMPROMISE CONTROVER-  
SIES

To the Creditors of the Above Named Bankrupt:

On May 19, 1948, at 10 a.m., a meeting of creditors of the above named bankrupt will be held in the courtroom of the undersigned Referee, 323 Federal Building, Temple and Spring Streets, Los Angeles 12, California, for the following purposes:

1. To hear the petition to compromise Trustee's claim against A. McBride, dba McBride Auto Sales, as follows: That the objections to the claim filed in this bankruptcy proceeding by A. McBride, dba McBride Auto Sales in the sum of \$1900.00 be withdrawn upon surrender by the said A. McBride of the sum of \$400.00, which sum represents the amount of the payment made by the bankrupt herein to the said claimant prior to bankruptcy.

2. To hear the petition to compromise Trustee's claim against George L. Gibbons as follows: The said George L. Gibbons has offered to pay to the trustee herein the sum of \$3,000.00, payable as follows: the sum of \$1,500.00 on or before May 15,

1948, and the sum of \$1500.00 on or before June 15, 1948, in full settlement of that certain action filed by the trustee herein against the said George L. Gibbons on or about December 24, 1947, in this Court, bearing number 7870-Y, and in addition thereto the said George L. Gibbons agrees to transfer and assign to the trustee herein all his right, title and interest in and to that certain promissory note heretofore, executed by Joseph G. White to the said George L. Gibbons, dated on or about May 19, 1947, in the sum of \$5,000.00 plus interest and attorney's fees; or in the alternative, all the right, title and interest in and to any recovery by the said George L. Gibbons in the action pending in the Superior Court of the Los Angeles County against the said Joseph G. White. The settlement offer further provides for the withdrawal of the claim of George L. Gibbons in the sum of \$19,500.00 heretofore filed in this bankruptcy proceedings, without prejudice to any rights which the said Gibbons may assert against the bankrupt personally.

For further particulars you are referred to the said petitions on file in the office of the undersigned Referee in Bankruptcy.

BENNO M. BRINK,  
Referee in Bankruptcy.

Dated: May 6, 1948.

Debtor .....	..
Debtor's Attorney .....	..
Bankrupt .....	1
Bankrupt's Attorney .....	1
Receiver .....	Dup.
Attorney for Receiver .....	Dup.
Trustee .....	1
Attorney for Trustee .....	1
Petitioner for Receiver .....	1
Creditors' Committee .....	..
Attorney for Creditors' Committee .....	..
Attorney for Petitioning Creditors' .....	Dup.
Assignee .....	..
Custodian .....	..
Schedule .....	56
Amendment to Schedule .....	..
List .....	..
Direct Claims .....	50
Power of Attorney .....	19
Request for Notices (Blue Sheet) .....	1
Taxing Agencies .....	3
Executory Contracts .....	..
U. S. Attorney .....	..
Secretary of Treasury .....	..
Securities and Exchange Commission .....	..
Person Reopening Case .....	..
Attorney for Person Reopening Case .....	..
Attorney filing dismissal, Compromise, etc.....	..
<b>Total</b>	<b>134</b>

Filed May 6, 1948. B. M. Brink, Referee.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 2.)

TRUSTEE'S EXHIBIT No. 5

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

ASSIGNMENT OF PROCEEDS

Know Ye that I, George L. Gibbons, plaintiff in the above action, do hereby transfer, assign and set over unto Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, all my right, title and interest in and to any sums or proceeds recovered in said action, whether by way of judgment, settlement or otherwise, including principal, interest, attorney's fees, costs or otherwise; and I do further covenant and agree that said action be continued in my name as plaintiff. I hereby authorize and direct the defendants, and each of them, to pay such proceeds directly to said Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt.

I do hereby warrant that I have made no other assignments or transfers in connection with the promissory note which is the basis of said action, or the cause of action therein asserted, or any recovery which may be had therein.



In Witness Whereof, I have caused this instrument to be executed this instrument to be executed this . . . day of June, 1948.

/s/ GEORGE L. GIBBONS.

Witness:

/s/ WM. K. MELOY.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 5.)

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TRUSTEE'S EXHIBIT No. 6

In the District Court of the United States, Southern  
District of California, Central Division

In Bankruptcy No. 45,176-BH

In the Matter of

AL HERD,

Bankrupt.

PETITION AUTHORIZING TRUSTEE'S ATTORNEYS TO BE SUBSTITUTED IN  
PENDING ACTION

The petition of Francis F. Quittner represents to this Court:

1. That he is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

2. That petitioner has heretofore moved this Court for an order confirming a compromise of an action brought by the Trustee in Bankruptcy herein against one George L. Gibbons in the United States

District Court, Southern District of California, Central Division. By order of the Honorable Benno M. Brink, Referee in Bankruptcy herein, dated the 25th day of May, 1948, said compromise was confirmed and the Trustee authorized to settle said action and all claims against Gibbons for the sum of \$3,000.00, together with an assignment by Gibbons of all right, title and interest in and to any recovery which may be had in an action pending in the Superior Court, Los Angeles County, brought by said Gibbons against one Joseph G. White upon a promissory note dated May 19, 1947, in the principal sum of \$5,000.00.

3. That in view of the fact that this estate is entitled to the proceeds of any recovery in said action, petitioner believes it to be in the best interests of this estate that his attorneys, Marvin Wellins and Daniel A. Weber, be substituted as attorneys for the plaintiff, George L. Gibbons, in said pending action against Joseph G. White in the Superior Court, Los Angeles County, bearing No. 533306.

4. That petitioner is informed that his attorneys, as well as the firm of Jones & Wiener, the attorneys representing George L. Gibbons as plaintiff in said action, are willing to effectuate such substitution; and that the firm of Jones & Wiener is willing to waive any and all claims to any compensation for services rendered in said action, either out of any recovery or against this estate.

5. Petitioner is informed that said action is scheduled for trial on August 26, 1948.

6. Petitioner's attorneys herein are willing to accept for their services in said action in the Superior Court such sum as this Court may allow out of the above estate.

Wherefore, petitioner prays for an order authorizing his attorneys herein, Marvin Wellins and Daniel A. Weber, to be substituted in the place and stead of Jones & Wiener, Esqs., as attorneys for the plaintiff in the action now pending in the Superior Court, Los Angeles County, wherein George L. Gibbons is plaintiff, and Joseph G. White defendant, bearing case No. 533306.

Dated: June 16, 1948.

/s/ FRANCIS F. QUITTNER,  
Trustee.

State of California,  
County of Los Angeles—ss.

Francis F. Quittner being by me first duly sworn, deposes and says: that he is the Trustee in Bankruptcy in the above-entitled proceeding; that he has read the foregoing Petition Authorizing Trustee's Attorneys to be Substituted in Pending Action and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 16th day of June, 1948.

[Seal]      /s/ ROSAMOND H. LEVY,  
Notary Public in and for said County and State of  
California.

[Endorsed]: Filed June 16, 1948. B. M. Brink,  
Referee.

[Endorsed]: Filed Oct. 4, 1949. (Exhibit No. 6.)

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TRUSTEE'S EXHIBIT No. 7

In the District Court of the United States, Southern  
District of California, Central Division

In Bankruptcy No. 45,176-BH

In the Matter of  
AL HERD,

Bankrupt.

ORDER AUTHORIZING TRUSTEE'S ATTOR-  
NEYS TO BE SUBSTITUTED IN A PEND-  
ING ACTION

Upon reading and filing the verified petition of Francis F. Quittner, Trustee herein, and good cause appearing therefor:

It Is Hereby Ordered that the Trustee's Attorneys herein, Marvin Wellins and Daniel A. Weber, be, and they are hereby authorized to be substituted in the place and stead of Jones & Wiener, Esqs., as attorneys for the plaintiff in an action now pending

in the Superior Court of the State of California, County of Los Angeles, wherein George L. Gibbons is plaintiff, and Joseph G. White defendant, bearing case No. 533306.

Dated: June 16, 1948.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed June 16, 1948. B. M. Brink,  
Referee.

[Endorsed]: Filed October 4, 1949. (Exhibit  
No. 7.)

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TRUSTEE'S EXHIBIT No. 8

Receipt Is Hereby Acknowledged a check of American National Bank and Trust Company of Chicago, dated December 10, 1948, in the sum of Five Thousand Dollars (\$5,000.00), being check No. 820,132, payable to Joseph White and Marcella White, and endorsed by each of them; and

Receipt Is Further Acknowledged of check of the California Bank, Hollywood Office, No. 91800, dated December 14, 1948, in the sum of One Thousand Two Hundred Twenty Dollars (\$1,220.00), payable to the order of Marcella White, and endorsed by her.

These Checks have been delivered to me as one of the Attorneys for Francis Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt. A receipt is acknowledged on behalf of Francis Quittner, as said Trustee, and as payment in full of the claim of



George L. Gibbons against Joseph White, et al., Case No. 533306, Los Angeles County Superior Court, subject to any adjustment which may be appropriate for disbursements to Sheriff, as the same may be hereafter ascertained. The two checks mentioned above include, among other things, the sum of Fifty-five and 80/100 Dollars (\$55.80) on account of disbursements to Sheriff for execution sale in said Case No. 533306.

Dated: December 14, 1948.

MARVIN WELLINS and

DANIEL A. WEBER,

By /s/ MARVIN WELLINS,

Attorneys for George L. Gibbons, in Case No. 533306, and Attorneys for Francis F. Quittner, Trustee in Bankruptcy of Al Herd, Bankrupt.

[Endorsed]: Filed October 4, 1949. (Exhibit No. 8.)

## TRUSTEE'S EXHIBIT No. 9

(Portion of)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, DOE ONE, DOE TWO and  
DOE THREE,

Defendants.

## COMPLAINT

(Promissory Note)

The Plaintiff Complains of the Defendants and  
for Cause of Action Alleges:

## I.

That the true names and capacities, whether individual, corporate, associate or otherwise, of defendants Doe One, Doe Two and Doe Three, are unknown to plaintiff, who, therefore, sues said defendants by such fictitious names, and will ask leave of court to amend this complaint to insert the true names and capacities of such defendants when they shall have been ascertained.

## II.

That on the 19th day of May, 1947, the defendant Joseph G. White made, executed and delivered

Trustee's Exhibit No. 9—(Continued)

to the plaintiff his promissory note, in words and figures as follows, to wit:

\$5000.00

May 19th, 1947

thirty..... after date without grace.....  
..... promise to pay to the order of G. L. Gibbons  
—Five Thousand—Dollars, For Value received, with  
interest from date at the rate of 8% per cent per  
annum until paid. Principal and interest payable  
in Lawful Money of the United States at.....  
..... and in case suit is instituted to col-  
lect this note or any portion thereof .....  
promise to pay such additional sum as the Court  
may adjudge reasonable as Attorney's fees in said  
suit.

/s/ JOS. G. WHITE.

No. #1—Due June 19th, 1947.

Witnessed

/s/ DONN B. DOWNEN, JR.

### III.

That defendant has not paid the same or any part thereof, and that the sum of Five Thousand Dollars (\$5000.00), the amount due on said note, together with interest from the 19th day of May, 1947, is now due and owing from said defendant to plaintiff.

### IV.

That by the terms of said note it is provided that in case suit is instituted to collect said note or any portion thereof, there shall be due to plaintiff such

## Trustee's Exhibit No. 9—(Continued)

additional sum as the court may adjudge reasonable as attorney's fees in said suit; that it has been and is necessary for plaintiff to institute this action for collection of said note, and plaintiff has been compelled to, and has employed Jones and Wiener as his attorneys, to institute and prosecute this action; that the sum of One Thousand Dollars (\$1000.00) is a reasonable sum to be allowed plaintiff for the fees of his attorneys herein.

Wherefore, plaintiff prays judgment against defendant as follows:

- (1) For the sum of Five Thousand Dollars (\$5000.00), principal of said note;
- (2) Interest from the 19th day of May, 1947, at the rate of eight per cent (8%) per annum;
- (3) For the sum of One Thousand Dollars (\$1000.00) as reasonable attorneys' fees;
- (4) For costs of suit herein;
- (5) For such other and further relief as to the court seems proper.

JONES and WIENER,  
Attorneys for Plaintiff.

By /s/ GEORGE M. WIENER.

State of California,  
County of Los Angeles—ss.

George L. Gibbons, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled

Trustee's Exhibit No. 9—(Continued)

action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE L. GIBBONS.

Subscribed and sworn to before me this 11th day of August, 1947.

[Seal]     /s/ GEORGE M. WIENER,  
Notary Public in and for the County of Los Angeles,  
State of California.

My commission expires Jan. 21, 1948.

[Endorsed]: Filed Aug. 12, 1947, Superior Court.



## Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, DOE ONE, DOE TWO and  
DOE THREE,

Defendants.

ANSWER OF DEFENDANT  
JOSEPH G. WHITE

Comes now the defendant Joseph G. White and for answer to plaintiff's Complaint, admits, denies, and alleges as follows:

## I.

This defendant is without sufficient information and belief to enable him to answer Paragraph I of plaintiff's Complaint, and basing his denial on that ground, denies generally and specifically each and every allegation, matter and thing therein contained.

## II.

Denies generally and specifically each and every allegation, matter and thing contained in Paragraphs III and IV of plaintiff's Complaint, more particularly denying that this defendant is indebted to plaintiff in any sum whatsoever or at all.

Trustee's Exhibit No. 9—(Continued)

Wherefore, this answering defendant prays judgment.

As a Further Separate and First Affirmative Defense to Plaintiff's Complaint, This Defendant Alleges:

I.

That the note sued upon was executed without any consideration whatsoever.

Wherefore, this answering defendant prays judgment.

As a Further Separate and Second Affirmative Defense to Plaintiff's Complaint, This Defendant Alleges:

I.

That the debt for which the note was executed had been fully paid and discharged before the execution of the note herein.

Wherefore, this answering defendant prays that plaintiff take nothing by his Complaint, that this defendant be allowed to go hence with his costs, and for such other and further relief as to the Court seems meet and proper.

CANNON & CALLISTER,

By /s/ Illegible,

Attorneys for Defendant,

Joseph G. White.

## Trustee's Exhibit No. 9—(Continued)

State of California,  
County of Los Angeles—ss.

Joseph G. White, being by me first duly sworn deposes and says: That he is one of the defendants in the above-entitled matter; that he has read the foregoing Answer of Defendant Joseph G. White and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 22nd day of August, 1947.

[Seal] /s/ Illegible.

Notary Public in and for the County of Los Angeles,  
State of California.

State of California,  
County of Los Angeles—ss.

J. Spotts, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles: that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business address is 650 South Spring Street, Los Angeles 14, California. That on the 22nd day of August, A.D., 1947, affiant served the within Answer of Defendant Joseph G. White on the plaintiff's attorneys

## Trustee's Exhibit No. 9—(Continued)

in said action, by placing a true copy thereof in an envelope addressed to Messrs. Jones and Wiener at the business address of said attorneys, as follows: 634 South Spring Street, Los Angeles 14, California and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ J. SPOTTS.

Subscribed and sworn to before me this 22nd day of August, 1947.

/s/ FLORENCE E. MORRISON,  
Notary Public in and for  
Said County and State.

[Endorsed]: Filed August 22, 1947. Superior Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

NOTICE OF MOTION AND AFFIDAVITS OF  
GEORGE L. GIBBONS, DONN B. DOW-  
NEN, JR., AND GEORGE M. WIENER IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

To Defendant Joseph G. White and Cannon &  
Callister, Esqs., His Attorneys:

Please Take Notice that on Monday, the 26th day of July, 1948, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the plaintiff will move this Court, in Department 35 thereof, the City Hall, Los Angeles, for an order under section 437c of the Code of Civil Procedure, striking the answer of defendant Joseph G. White and granting plaintiff summary judgment for the relief prayed for in the complaint.

Please Take Further Notice that said motion will be made on the grounds that the answer of said defendant is sham; that there is no triable issue of fact herein; and upon each and all of the grounds



Trustee's Exhibit No. 9—(Continued)

set forth in said section. Said motion will be based upon the annexed affidavit of George L. Gibbons, sworn to July 9, 1948; the annexed affidavit of Donn B. Downen, Jr., sworn to June 25, 1948; the annexed affidavit of George M. Wiener, sworn to June 24, 1948; and upon the pleadings and proceedings heretofore had herein.

Dated: July 13, 1948.

MARVIN WELLINS and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,  
Attorneys for Plaintiff.

Points and Authorities

I.

A denial or defense in form alone is not enough. The defendant must aver by affidavit "particulars" or "facts" of his defense as will satisfy the Court that he has an "arguable defense" on the merits.

C. C.P. 437c.

McComsey v. Leaf,

36 C.A.(2) 132, 140.

Eagle Oil & Ref. Co. v. Prentice,

19 C.(2) 553, 555.

Bank of America v. Oil Wells S. Co.,

12 C.A.(2) 265, 269.

Security-First Nat. Bank of Los Angeles v.  
Cryer,

39 C.A.(2) 757, 760-761.

## Trustee's Exhibit No. 9—(Continued)

## II.

Summary judgment should be granted where “the issue is not genuine but feigned” or where the pleaded defenses are “sham.”

McComsey v. Leaf,

36 C.A.(2) 132, 140.

Bank of America v. Oil Wells S. Co.,

12 C.A.(2) 265, 269.

In the Superior Court of the State of California

In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF GEORGE L. GIBBONS IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

State of Arizona,

County of Cochise—ss.

George L. Gibbons, being first duly sworn, deposes and says:

1. I am the plaintiff.

2. I make this affidavit in support of my motion pursuant to C.C.P. 437 (c) for an order striking the

Trustee's Exhibit No. 9—(Continued)

defendant's answer and granting summary judgment for the relief prayed for in the complaint.

3. The action is one to recover the sum of \$5,000.00, plus interest, and attorney's fees in the sum of \$1,000.00, upon a promissory note executed by the defendant Joseph G. White, payable to me, which note is in the following form:

\$5000.00

May 19, 1947

thirty..... after date without grace.....  
..... promise to pay to the order of G. L. Gibbons  
—Five Thousand— Dollars, For Value received,  
with interest from date at the rate of 8% per cent  
per annum until paid. Principal and interest payable  
in Lawful Money of the United States at .....  
..... and in case suit is instituted to  
collect this note or any portion thereof, .....  
promise to pay such additional sum as the Court  
may adjudge reasonable as Attorney's Fees in said  
suit.

/s/ JOS. G. WHITE.

No. #1—Due June 19th, 1947.

Witnessed

/s/ DONN B. DOWNEN, JR.

The answer filed by the said defendant admits the execution of said note and alleges, by way of defense lack of consideration for said note (first affirmative defense). The answer further alleges that the "debt for which the note was executed had been fully paid

Trustee's Exhibit No. 9—(Continued)  
and discharged before the execution of the note herein" (second affirmative defense). No date or other circumstance of such alleged payment is alleged.

4. The circumstances surrounding the execution of said note are as follows: at or about the time of its execution (May 19, 1947) one Al Herd, a dealer in used cars, was indebted to me in the approximate amount of \$32,250.00 by reason of advances which I had theretofore made to Herd. These advances were secured in part by Herd's delivery to me of a number of "pink slips," or certificates of title, pertaining to certain motor vehicles purchased by Herd. Upon Herd's failing to repay said indebtedness, an action was brought by me against Al Herd on or about May 13, 1947, to recover said sum of \$32,250.00 plus interest. Said action was instituted in this court and bears case No. 529429.

5. At the time of the filing of the complaint in said action, a Writ of Attachment was issued and a levy thereupon made upon Herd's bank accounts. At or about the time said Writ of Attachment was levied as aforesaid the defendant interested himself in financing Herd's business and became associated with Herd in said automobile business.

6. Immediately after said attachment was levied a series of conferences were held, in which the following participated: the defendant Joseph G. White, Herd, Donn B. Downen, Jr. (the person whose name appears upon said note as witness

## Trustee's Exhibit No. 9—(Continued)

thereto), Mr. George Wiener (my attorney) and myself. Mr. Downen was then acting as attorney for Messrs. Herd and White, the defendant. These conferences culminated in a meeting at the office of my attorneys, Jones & Wiener, 634 South Spring Street, Los Angeles, California, on or about the date of said note (May 19, 1947), at which I promised to release said attachment and dismiss the action brought by me against Herd and return certain certificates of title theretofore delivered to me by Herd covering certain motor vehicles purchased by him, in return for three promissory notes: one executed by the defendant, payable to me, in the sum of \$5,000.00 (the note in suit); one executed by Harry Karl in the sum of \$5,000.00; and the promissory note of Herd in the amount of \$20,500.00. The Karl note was thereafter paid, while the notes of the defendant White and Herd were thereafter defaulted.

7. Upon the execution and delivery of said notes, I released said attachment, dismissed said motion and redelivered to Herd the certificates of title in my possession which had theretofore been delivered to me by Herd. (An involuntary petition in bankruptcy was thereafter filed against Herd.)

8. The note in suit was thereafter presented for payment, and payment thereof was refused.

9. The claim interposed in the defendant's answer that there was no consideration for the note in suit is entirely fictitious. As has been pointed



## Trustee's Exhibit No. 9—(Continued)

out, the consideration for said note was the release of my attachment on Herd's bank accounts, the dismissal of my action against him and my return to Herd of the certificates of title aforesaid, thus enabling Herd's business to continue. Furthermore, Herd's pre-existing indebtedness to me, previously referred to, was extinguished to the extent of said \$5,000.00, the amount of the defendant's note. Similarly, the Karl note further extinguished Herd's subsisting indebtedness to me in the additional amount of \$5,000.00, in consequences of which I accepted Herd's note in the lesser sum of \$20,500.00, the previous indebtedness of Herd being approximately \$32,250.00.

10. I claim that there is no defense to the action. The foregoing facts, which are within my direct knowledge, establish conclusively that the defenses interposed by the defendant are sham, fictitious and frivolous, and that there is no triable issue of fact.

11. I affirm further that by reason of the defendant's default in payment of principal and interest I was obliged to retain the services of Jones and Wiener to institute this action; and that my present attorneys, Marvin Wellins and Daniel A. Weber, were substituted in their stead on June 2, 1948.

Wherefore, I pray for an order under Section 437(c) of the Code of Civil Procedure striking out the defendant's answer and granting plaintiff sum-

Trustee's Exhibit No. 9—(Continued)

mary judgment in the sum of \$5,000.00, plus interest at the rate of 8% per annum from June 19, 1947, plus reasonable attorney's fees, together with costs of suit, as prayed in the complaint.

/s/ GEORGE L. GIBBON.

Subscribed and sworn to before me this 9th day of July, 1948.

[Seal] /s/ WM. K. MELOY,  
Notary Public in and for the County of Cochise,  
State of Arizona.

My Commission Expires July 23, 1950.

In the Superior Court of the State of California in  
and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF DONN B. DOWNEN, JR.

State of California,  
County of Los Angeles—ss.

Donn B. Downen, Jr., being first duly sworn, deposes and says:

1. I am an attorney at law, with offices in the

## Trustee's Exhibit No. 9—(Continued)

City of Los Angeles, State of California, and formerly represented Al Herd in connection with the automobile business heretofore conducted by Herd at 7077 Sunset Boulevard, Los Angeles.

2. I recall the execution of the note in suit and the circumstances surrounding the same. My recollection is as follows: One Al Herd was indebted to the plaintiff in a sum in excess of \$30,000.00 in May, 1947. During said month White became interested in Herd's business and undertook to put up certain finances. Several days prior to the execution of the note Gibbons' attorneys (Jones & Wiener) procured a Writ of Attachment in an action brought in this Court by Gibbons against Herd, and caused the same to be levied upon Herd's bank accounts. White and Herd thereupon came to me with a view to bringing about the release of said attachment and the dismissal of said action. After some meetings in my office, we met in the office of Jones & Wiener on or about May 19, 1947, the date of the execution of the note. After much negotiation Gibbons promised and agreed that he would release the attachment, dismiss the action and return to Herd certain certificates of title pertaining to automobiles purchased by Herd which had been delivered by Herd to Gibbons as security for repayment of advances, in return for three promissory notes as follows: a note executed by White in the sum of \$5,000.00 (the note in suit), a note executed by one Harry Karl in the sum of \$5,000.00, and a note

Trustee's Exhibit No. 9—(Continued)

executed by Herd in the sum of \$20,500.00. The said parties agreed that the two notes of \$5,000.00 each were to be accepted as payment pro tanto on Herd's indebtedness to Gibbons. Herd's note represented the approximate difference between the pre-existing indebtedness of Herd to Gibbons and the two notes of White and Karl aggregating \$10,000.00.

3. Said notes were thereupon delivered, and I witnessed the execution of the note in suit and affixed my name thereto as a witness. The Writ of Attachment procured by Gibbons in said action was thereupon released, the action dismissed, and said certificates of title were returned to Herd.

4. I make this affidavit at the request of the plaintiff's attorneys, and I affirm that I have no interest in the action or in any recovery.

/s/ DONN B. DOWNEN, JR.

Subscribed and sworn to before me this 25th day of June, 1948.

[Seal]      /s/ EDNA R. BENNETT,  
Notary Public in and for the County of Los Angeles, State of California.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California in  
and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

AFFIDAVIT OF GEORGE M. WIENER IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

State of California,  
County of Los Angeles—ss.

George M. Wiener, being first duly sworn, deposes and says:

1. I am a member of the firm of Jones & Wiener, attorneys at law, of Los Angeles, California, which firm formerly represented the plaintiff in this action.

2. Messrs. Wellins and Weber have been substituted in our place and stead as attorneys for the plaintiff by stipulation of the parties.

3. I state of my own knowledge that on or about May 13, 1947, my firm instituted an action on behalf of the plaintiff against one Al Herd in this court to recover the sum of \$32,250.00, plus interest,



## Trustee's Exhibit No. 9—(Continued)

representing an indebtedness owed by Herd to the plaintiff. Said action bears No. 529429. We procured a Writ of Attachment in said action and caused the same to be levied by the Sheriff of the County of Los Angeles upon Herd's bank accounts. Immediately thereafter negotiations were under way looking to the lifting of said attachment and the dismissal of the action. The following participated in said negotiations: Mr. Donn B. Downen, Jr., the defendant Joseph G. White, Herd, the plaintiff and myself. Mr. Downen was then acting as attorney for Messrs. White and Herd in connection with the automobile business conducted by Herd at 7077 Sunset Boulevard, Los Angeles, California, in which White had become interested financially. After several meetings an agreement was reached in my office, at which meeting said persons were present. By the terms of said agreement the plaintiff, my client, agreed to release said attachment, dismiss the action and return certain certificates of title in his possession pertaining to certain motor vehicles theretofore purchased by Herd, which certificates had been given to the plaintiff by Herd as security for the repayment of said advances. Herd and White agreed that the following three promissory notes would be delivered to the plaintiff: White's note for \$5,000.00 (the note in suit), a note executed by one Harry Karl in the sum of \$5,000.00, and the note of Herd in the sum of \$20,500.00. It was agreed that the two notes of White and Herd would be accepted in

Trustee's Exhibit No. 9—(Continued)  
payment pro tanto of the pre-existing indebtedness of Herd to the plaintiff.

4. Said notes were thereupon executed and delivered to the plaintiff, the note in suit being witnessed by Mr. Downen, who was then acting as attorney for White and Herd in the transaction.

5. The attachment was thereupon lifted, a dismissal filed and the certificates of title in plaintiff's possession returned to Herd.

6. The Karl note was thereafter paid, while the note in suit and the Herd note were defaulted.

7. In connection with the prayer in the complaint for attorney's fees, pursuant to the provisions of the note, I state as follows: upon retention by the plaintiff I examined into the facts, which necessitated several conferences and examinations of many documents; prepared and filed the complaint in this action; procured the issuance of Writ of Attachment and caused the same to be levied upon the defendant's real property; noticed the case for trial; spent a total of ten hours on legal research, and spent approximately 30 hours in the preparation of the case for trial.

8. I state that neither my firm nor I have any interest in this action or in any recovery.

/s/ GEORGE M. WIENER.

Trustee's Exhibit No. 9—(Continued)

Subscribed and sworn to before me this 24th day of June, 1948.

[Seal]      /s/ MARY JANE SANDERS,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Apr. 12, 1950.

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,  
County of Los Angeles—ss.

Shirley Nakell, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 South Beverly Drive, Beverly Hills, California; that on the 13th day of July, 1948, affiant served the within Notice of Motion and Affidavits of George L. Gibbons, Donn B. Downen, Jr., and George M. Wiener in Support of Plaintiff's Motion for Summary Judgment on the Defendant Joseph G. White in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Defendant Joseph G. White at the office of said attorneys, as follows: Cannon & Callister, Attorneys at Law, 650 So. Spring St., Los Angeles, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at the city

Trustee's Exhibit No. 9—(Continued)  
where is located the office of the attorney for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed or there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ SHIRLEY NAKELL.

Subscribed and sworn to before me this 13th day of July, 1948.

[Seal]      /s/ DANIEL A. WEBER,  
Notary Public in and for Said County and State of California.

My Commission expires Oct. 29, 1951.

[Endorsed]: Filed July 15, 1948, Superior Court.

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

#### SUBSTITUTION OF ATTORNEYS

Plaintiff George L. Gibbons hereby substitutes Marvin Wellins and Daniel A. Weber as his attor-

Trustee's Exhibit No. 9—(Continued)

neys of record in place and stead of Jones & Wiener, Esqs.

Dated: June 2, 1948.

/s/ GEORGE L. GIBBONS.

We consent to the above substitution.

JONES & WIENER,

By /s/ GEORGE M. WIENER.

Above substitution accepted.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER.

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,

County of Los Angeles—ss.

Shirley Nakell, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 South Beverly Drive, Beverly Hills, Calif.; that on the 13th day of July, 1948, affiant served the within Substitution of Attorneys on the Defendant in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Defendant at the office address



Trustee's Exhibit No. 9—(Continued)  
of said attorneys, as follows: Cannon & Callister,  
Attorneys at Law, 650 So. Spring St., Los Angeles  
14, Calif., and by then sealing said envelope and  
depositing the same, with postage thereon fully pre-  
paid, in the United States Mail at the city where is  
located the office of the attorney for the person by  
and for whom said service was made.

That there is a delivery service by United States  
mail at the place so addressed or there is a regular  
communication by mail between the place of mailing  
and the place so addressed.

/s/ SHIRLEY NAKELL.

Subscribed and sworn to before me this 15th day  
of July, 1948.

[Seal]      /s/ DANIEL A. WEBER,  
Notary Public in and for said County and State of  
California.

My Commission expires Oct. 29, 1951.

[Endorsed]: Filed July 16, 1948. Superior Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE et al.,

Defendants.

JUDGMENT AFTER ORDER GRANTING  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT

The plaintiff having moved this court by notice of motion dated July 13, 1948, for summary judgment pursuant to section 437c of the Code of Civil Procedure, striking out the defendant's answer and granting the plaintiff judgment for the relief prayed for in the complaint; and said motion having duly come on to be heard in Department 35 of this Court on the 16th day of August, 1948; and the plaintiff having filed the affidavit of George L. Gibbons, sworn to the 9th day of June, 1948, the affidavit of Donn B. Downen, Jr., sworn to the 25th day of June, 1948, and the affidavit of George M. Wiener, sworn to the 24th day of June, 1948, in support of said motion; and the defendant Joseph G. White having filed his affidavit, sworn to the 4th day of August, 1948, in opposition to said motion; and Marvin Wellins and Daniel A. Weber, by Dan-

## Trustee's Exhibit No. 9—(Continued)

iel A. Weber, attorneys for the plaintiff, having been heard in support of said motion; and Fred Horowitz and Alvin F. Howard, by Alvin F. Howard, attorneys for the defendant Joseph G. White, having been heard in opposition thereto; and said motion having been granted in all respects on August 16, 1948; and sufficient cause appearing therefor;

Now, on motion of Mervin Wellins and Daniel A. Weber, attorneys for plaintiff, it is

Ordered, Adjudged and Decreed that George L. Gibbons, plaintiff, have judgment against Joseph G. White, defendant, for the sum of \$5,000.00, with interest thereon from the 19th day of May, 1947, at the rate of eight (8%) per cent per annum, in the sum of \$500.00, plus the additional sum of \$500.00 representing reasonable attorney's fees herein, making a total of \$6,000.00; and it is further

Ordered and Adjudged that plaintiff recover his costs of suit in the sum of \$35.75; and it is further

Ordered that issuance of execution upon said judgment be stayed for twenty days after entry thereof.

Dated at Los Angeles, California, this 24th day of August, 1948.

/s/ VERNON W. HUNT,

Judge of the Superior Court.

[Stamped]: Wholly Unsatisfied by Sheriff 10-15-48 with Further Costs of \$17.30.

Trustee's Exhibit No. 9—(Continued)

Attest:

W. G. SHARP,  
County Clerk.

By C. REICHERT,

10-27-48

Deputy.

Wholly Unsatisfied by Sheriff 12-23-48, with  
Further Costs of \$19.25.

Attest:

W. G. SHARP,  
County Clerk.

By FERN CHEWNING,

1-5-49

Deputy.

[Entered]: Aug. 25, 1948. Superior Court.

[Endorsed]: Filed August 24, 1948. Superior  
Court.

Trustee's Exhibit No. 9—(Continued)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533,306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

### NOTICE OF ENTRY OF JUDGMENT

To Defendant Joseph G. White and Fred Horowitz  
and Alvin Howard, His Attorneys:

Please Take Notice that on August 25, 1948, judgment was entered in favor of plaintiff and against defendant Joseph G. White for the sum of \$5,000.00, plus interest in the sum of \$500.00, plus attorney's fees in the sum of \$500.00, making a total in the sum of \$6,000.00; and further adjudging that plaintiff recover his costs. Twenty days' stay of execution.

Dated: August 30, 1948.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,

Attorneys for Plaintiff.



Trustee's Exhibit No. 9—(Continued)

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,  
County of Los Angeles—ss.

Daniel A. Weber, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 208 S. Beverly Dr., Beverly Hills; that on the 30th day of August, 1948, affiant served the within Notice of Entry of Judgment on the defendant Joseph G. White in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Messrs. Fred Horowitz and Alvin F. Howard, 604 Union Bank Bldg., Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with proper postage thereon fully prepaid, in the United States Mail at the city where is located the office of the attorneys for the person by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ DANIEL A. WEBER.

## Trustee's Exhibit No. 9—(Continued)

Subscribed and sworn to before me this 30th day of August, 1948.

[Seal]                    /s/ [Illegible],  
Notary Public in and for said County and State of  
California.

[Endorsed]: Filed August 1, 1948. Superior  
Court.

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 533306

GEORGE L. GIBBONS,

Plaintiff,

vs.

JOSEPH G. WHITE,

Defendant.

SATISFACTION OF JUDGMENT

The Judgment herein having been paid, full satisfaction is hereby acknowledged of said Judgment entered August 25, 1948, in Book 1954, Page 37, of Judgments, in favor of George L. Gibbons and against Joseph G. White, and the Clerk is hereby

Trustee's Exhibit No. 10—(Continued)  
authorized and directed to enter full satisfaction  
of record in said action.

Dated: December 13, 1948.

MARVIN WELLINS, and  
DANIEL A. WEBER,  
By /s/ DANIEL A. WEBER,  
Attorneys for Judgment  
Creditor.

State of California,  
County of Los Angeles—ss.

On this 13th day of December, in the year one  
thousand nine hundred and forty-eight, before me,  
Shirley Nakelsky, a Notary Public in and for said  
County of Los Angeles, State of California, resid-  
ing therein, duly commissioned and sworn, person-  
ally appeared Daniel A. Weber, known to me to be  
the same person whose name is subscribed to the  
within instrument, and he duly acknowledged to me  
that he executed the same.

In Witness Whereof, I have hereunto set my  
hand and affixed my Official Seal the day and year  
in this certificate first above written.

[Seal] /s/ SHIRLEY NAKELSKY,  
Notary Public in and for the County of Los An-  
geles, State of California.

[Endorsed]: Filed December 17, 1948. Superior  
Court.

[Endorsed]: Filed October 4, 1949. (Exhibit  
No. 9.)

## TRUSTEE'S EXHIBIT No. 10

(Portion of)

In the Superior Court of the State of California  
In and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of AL HERD, Bankrupt,  
Plaintiff,

vs.

JOSEPH G. WHITE, FILMLAND MOTORS, a California Corporation; AL HERD, INC., a California Corporation; JOHN DOE ONE, JOHN DOE TWO; JOHN DOE CORPORATION, a California Corporation; RICHARD ROE and SAMUEL DOE, Individually and as Co-partners, Doing Business as ROE & DOE, Defendants.

## COMPLAINT

(Action for Partnership Accounting)

Plaintiff complains and alleges:

## I.

That on or about August 6, 1947, an involuntary petition in bankruptcy was filed against one Al Herd (hereinafter called the "bankrupt") in the United States District Court, Southern District of California, Central Division; and that on or about August 13, 1947, the said Al Herd was duly adjudi-

Trustee's Exhibit No. 10—(Continued)

cated a bankrupt within the purview of the Federal Bankruptcy Acts.

II.

That plaintiff is the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt.

III.

That plaintiff has been authorized by said bankruptcy court to institute this action.

IV.

That defendant Filmland Motors is a corporation duly organized and existing under the laws of the State of California; and that the name of said corporation was formerly Angel Motors.

V.

That defendant Al Herd, Inc., is a corporation duly organized and existing under the laws of the State of California.

VI.

That defendants John Doe One, John Doe Two, John Doe Corporation, a California corporation; Richard Roe and Samuel Doe, individually and as co-partners doing business as Roe and Doe (all of whom are hereinafter called the "Doe defendants"), are sued herein by fictitious names, their true names being unknown to plaintiff; and upon ascertainment thereof, plaintiff will ask leave of Court to amend the summons, complaint and all other papers and proceedings herein to include their true names.



## Trustee's Exhibit No. 10—(Continued)

## VII.

That on or about November 27, 1945, one A. F. Rosen and Gertrude Rosen, as sublessors (hereinafter called "sublessor"), and the bankrupt, as sublessee, entered into a written sublease bearing said date, whereby said sublessor leased unto said sublessee certain buildings and premises located at and commonly known as 7077 Sunset Boulevard, and 1512 North La Brea Avenue, in the City of Los Angeles, State of California, for a term commencing said date and expiring January 31, 1947, with an option therein contained in favor of said sublessee for an additional year thereafter, and a further option in favor of said sublessee for an additional two years following the expiration of said one-year period. Said written sublease is hereinafter called the "lease," and the aforesaid buildings and premises covered thereby, the "demised premises."

## VIII.

That pursuant to the terms of said lease, the term thereof was heretofore extended for the additional year expiring January 31, 1948.

Plaintiff Is Informed and Believes, and Upon Such Information and Belief Further Alleges:

## IX.

That in or about the month of May, 1947, and continuously from November 27, 1945, the bankrupt conducted upon the demised premises, and was en-

## Trustee's Exhibit No. 10—(Continued)

gaged in, the business of (a) buying and selling at retail used cars and motor vehicles, and (b) operating auction sales of cars and motor vehicles upon the demised premises. (The auction sales referred to in “(b)” hereof are hereinafter called the “auction business”; both “(a)” and “(b)” hereof are collectively hereinafter called the “business.”)

## X.

That in and during the month of May, 1947, the bankrupt and defendant Joseph G. White, for a valuable consideration, entered into an oral agreement of partnership, whereby the parties agreed as follows:

(a) The bankrupt and defendant White were to operate as partners the auction business aforesaid, for a term commencing on the date of said agreement, and expiring January 31, 1948.

(b) The bankrupt was to permit the partnership to use and occupy the demised premises for said auction business, reserving unto himself the right to continue his business of buying and selling at retail used cars and motor vehicles upon the demised premises, and further to contribute the good-will of the said auction business theretofore conducted by the bankrupt upon the demised premises, as well as his experience and knowledge in operating the same, and his personal services in conducting said auction business for and on behalf of the partnership;

(c) Defendant White was to pay to creditors of

## Trustee's Exhibit No. 10—(Continued)

the bankrupt, for and on account of debts theretofore incurred by the bankrupt, the sum of Thirty-five Thousand and no/100 Dollars (\$35,000.00); and

(d) The parties were to share profits and losses from said auction business in the proportions of seventy-five per cent (75%) to the bankrupt, and twenty-five per cent (25%) to defendant White.

## XI.

That thereafter, and in or during the month of May, 1947, the bankrupt and defendant White orally modified and supplemented said agreement of partnership and agreed as follows:

(a) The bankrupt and defendant White were to operate as partners, for the term described in paragraph X(a) hereof, the business of buying and selling at retail used cars and motor vehicles upon the demised premises, in addition to their operation of the auction business as aforesaid;

(b) The reservation by the bankrupt of the right to conduct on his personal behalf the buying and selling at retail of used cars and motor vehicles, as alleged in paragraph X hereof, was annulled and extinguished;

(c) The bankrupt was to contribute further to the partnership: (1) the good-will of the entire business theretofore conducted by him upon the demised premises, (2) any and all accounts receivable belonging to said business, (3) any and all residual rights in and to dealer's reserves or credits in favor of or belonging to the bankrupt, and (4)

## Trustee's Exhibit No. 10—(Continued)

his experience, knowledge and personal services in the operation of said business for and on behalf of the partnership;

(d) Defendant White was to contribute to the partnership the sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00), in addition to the sum of Thirty-five Thousand and no/100 Dollars (\$35,000.00) referred to in the preceding paragraph hereof;

(e) The partnership was to assume and pay all the debts and liabilities of the bankrupt theretofore incurred by him in the operation of said business; and

(f) The parties were to share the profits and losses from the entire business in equal proportions.

(The partnership agreement as so amended and supplemented is hereinafter called the "partnership agreement.")

## XII.

That thereafter, pursuant to said partnership agreement, the parties conducted business as partners in buying and selling at retail used cars and automobiles, and in operating auction sales of cars and motor vehicles, upon the demised premises.

## XIII.

That in and during the month of July, 1947, defendant White, by the exercise of threats, duress and menace, forcibly excluded the bankrupt from further participation in the affairs and conduct of said business, denied him access to the premises,

Trustee's Exhibit No. 10—(Continued)  
and thereupon took sole possession of the demised premises and the personal property of said business.

#### XIV.

That defendant White thereupon repudiated said partnership agreement, and his duties thereunder, and in violation thereof, and of his fiduciary obligations to the bankrupt, retained possession of said demised premises and undertook on his own behalf the conduct and operation of said business.

#### XV.

That defendant White thereupon caused a corporation to be organized under the laws of the State of California, to wit, Angel Motors, which was and is owned and controlled by defendant White; that its officers and directors were and are nominees and designees of defendant White; and that the name of said corporation was thereafter changed to Film-land Motors, defendant herein.

#### XVI.

That subsequent to his taking exclusive possession as aforesaid, defendant White did wrongfully induce said sublessor to declare said lease cancelled and terminated in writing, and to execute to his nominee, to wit, Angel Motors (Film-land Motors), as sublessee, a new written sublease of the demised premises for a term commencing August 1, 1947, and ending January 31, 1948. (Said sublease is hereinafter called the "White lease.")



## Trustee's Exhibit No. 10—(Continued)

## XVII.

That from its inception, defendant Angel Motors (Filmland Motors) had knowledge of the facts herein alleged.

## XVIII.

That at divers times in and during the month of July, 1947, defendant White wrongfully took and converted to his own use certain funds, checks and instruments for the payment of money belonging to said partnership, representing the proceeds from auction sales conducted upon the demised premises on or about July 8, July 15, and July 22, 1947; and that other funds have been received by him belonging to the partnership, for all of which he has failed to account, and which he has also converted to his own use.

## XIX.

That at all times from the taking of possession by defendant White as aforesaid, and until on or about February 1, 1948, said defendant, either directly or through defendant Filmland Motors as his instrumentality, continued in possession of the demised premises and continued to operate the business theretofore conducted by the said partnership.

## XX.

That between the making of said Partnership Agreement and the filing of said Petition in Bankruptcy, the bankrupt personally paid to the partnership employees diverse sums as and for partnership payroll for wages and also paid, on behalf of said

## Trustee's Exhibit No. 10—(Continued)

partnership, diverse sums to creditors whose claims had been assumed by said partnership as alleged in paragraph V hereof, all of which payments aggregated the sum of approximately Twenty-five Thousand Dollars (\$25,000.00), the exact amount being unknown to plaintiff. That said payments and each of them were made by the bankrupt on behalf of said partnership, and that the same are due, owing and unpaid by said partnership to the bankrupt.

## XXI.

That neither the partnership nor defendant White has reimbursed the bankrupt for any part thereof, nor contributed any portion thereof, despite due demand therefor.

## XXII.

That defendant White has failed and neglected to contribute to the partnership his agreed capital contribution in the sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00), or any part thereof, referred to in paragraph XI hereof.

## XXIII.

That there are now, and as of the date of filing said petition in bankruptcy against the bankrupt, to wit, August 6, 1947, there were, partnership debts and liabilities in excess of Fifty Thousand and no/100 Dollars (\$50,000.00).

## XXIV.

That the bankrupt has duly performed all the

Trustee's Exhibit No. 10—(Continued)

conditions of said partnership agreement on his part.

### XXV.

That by reason of the aforesaid acts and conduct of defendants White and of Angel Motors (Film-land Motors), the business and good-will of said partnership have been totally destroyed, and the bankrupt's right, title and interest therein have been rendered entirely valueless; that by reason thereof, the bankrupt has been damaged in the sum of Fifty Thousand and no/100 Dollars (\$50,000.00).

### XXVI.

That the defendant Al Herd, Inc., is a corporation organized and existing under and by virtue of the laws of California, with its principal place of business in the County of Los Angeles, and that said defendant and the Doe defendants have or claim to have some interest in and to the said lease, the White lease and the demised premises, which interest is adverse or subordinate to that of the partnership; and they have been named defendants in order that their rights may be fully determined herein.

### XXVII.

That defendant White has failed to render to the bankrupt or plaintiff any accounting of his acts and conduct subsequent to his taking of possession of said demised premises, and his operation of said business, despite due demand therefor.

## Trustee's Exhibit No. 10—(Continued)

Wherefore, plaintiff prays judgment:

- (a) Dissolving said partnership;
- (b) Requiring defendant White to account for all acts, transactions, matters and happenings pertaining to and arising out of said partnership;
- (c) Requiring defendant White to make contribution in accordance with Section 2434 (d) and (e) of the Civil Code, and also of the unpaid capital contribution referred to in paragraph XXII hereof;
- (d) Requiring defendant White to reimburse plaintiff to the extent of one-half of the amounts personally paid by the bankrupt on account of partnership liabilities, as alleged in paragraphs XX and XXI hereof;
- (e) Requiring defendant White to account for the funds, checks and instruments for the payment of money and other property belonging to the partnership and taken and converted by him to his own use, or received by him;
- (f) Requiring defendant White to account for the profits, gains, issues and emoluments resulting from his wrongful procurement of the White lease to his nominee, to wit, Angel Motors (Filmland Motors) and his wrongful operation of the business upon the demised premises for his own benefit;
- (g) Adjudging that the right, title and interest of defendants White and Angel Motors (Filmland Motors) or either of them, in and to the White lease and any renewals or extensions thereof, and in and

Trustee's Exhibit No. 10—(Continued)

to the demised premises, be held for the benefit of said partnership;

(h) Directing the sale of all partnership assets and the distribution of the proceeds to partnership creditors in payment of their claims;

(i) Enjoining the defendants from making or suffering any transfer or other disposition of partnership assets, directly or indirectly;

(j) Appointing a receiver pendente lite, and to carry out the provisions of the final judgment and decree to be entered herein;

(k) Appointing a referee to take and state the account of said partners;

(l) Adjudging that plaintiff recover of defendants White and Filmland Motors the sum of Fifty Thousand and no/100 Dollars (\$50,000.00) as damages; and

(m) Granting plaintiff such other and further relief as may be just and equitable.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ MARVIN WELLINS,

Attorneys for Plaintiff.



## Trustee's Exhibit No. 10—(Continued)

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bank-  
ruptcy of AL HERD, Bankrupt,  
Plaintiff,

vs.

JOSEPH G. WHITE, et al.,  
Defendants.

ANSWER OF DEFENDANTS JOSEPH G.  
WHITE AND FILMLAND MOTORS

Defendants Joseph G. White and Filmland Motors, a California corporation, in answer to plaintiff's complaint, admit, deny and allege, as follows:

## I.

Defendants have no information or belief on the subject sufficient to enable them to answer thereto, and for the want of such information and belief, deny generally and specifically each and all of the allegations contained in paragraphs VII and VIII.

## II.

Deny generally and specifically each and all of the allegations contained in paragraphs X, XI, XII, XIII and XIV.

## III.

Admit that a corporation was organized under

## Trustee's Exhibit No. 10—(Continued)

the laws of the State of California, known as Angeles Motors; that the name was subsequently changed to Filmland Motors, named as defendant herein. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XV.

## IV.

Deny generally and specifically each and all of the allegations contained in paragraphs XVI, XVII and XVIII.

## V.

Allege that defendant Filmland Motors occupied the premises theretofore occupied by one Al Herd, pursuant to a lease obtained by said defendant Filmland Motors. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XIX.

## VI.

Deny generally and specifically each and all of the allegations contained in paragraph XX.

## VII.

Admit that defendant Joseph G. White has not paid any of the sum referred to in paragraph XX. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXI.

## VIII.

Admit that defendant White has not paid the sum of \$65,000.00, or any part thereof, to the

Trustee's Exhibit No. 10—(Continued)  
alleged partnership. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXII.

IX.

Deny generally and specifically each and all of the allegations contained in paragraph XXIII.

X.

Allege that there was no partnership agreement in which the defendant White was a partner. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXIV.

XI.

Deny generally and specifically each and all of the allegations contained in paragraph XXV.

XII.

Admit that Al Herd, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles. Except as herein admitted, deny generally and specifically each and all of the allegations contained in paragraph XXVI.

XIII.

Admit that defendant White has not rendered to the plaintiff or to the bankrupt any accounting. Except as herein alleged, deny generally and specifically each and all of the allegations contained in paragraph XXVII.

Trustee's Exhibit No. 10—(Continued)

Wherefore, defendants pray judgment that plaintiff take nothing by his action, and that defendants be given judgment for their costs and disbursements herein, and for such other and further relief as the Court deems proper.

FRED HOROWITZ,

ALVIN F. HOWARD,

By /s/ ALVIN F. HOWARD,

Attorneys for Defendants White and Filmland  
Motors.

State of California,  
County of Los Angeles—ss.

Joseph White being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOSEPH G. WHITE.

Subscribed and sworn to before me this 9th day of April, 1948.

[Seal] /s/ MARGARET L. DAVIS,

Notary Public in and for the County of Los Angeles, State of California.

## Trustee's Exhibit No. 10—(Continued)

(Affidavit of Service by Mail—1013a, C.C.P.)

State of California,

County of Los Angeles—ss.

Charlotte R. Cohen, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above-entitled action; that affiant's business-residence is: 604 Union Bank Bldg., Los Angeles, that on the 9th day of April, 1948, affiant served the within answer on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said plaintiff at the residence/office address of said attorney, as follows: Marvin Wellins and Daniel A. Weber, Attorneys at Law, Suite 720, 417 So. Hill Street, Los Angeles 13, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CHARLOTTE R. COHEN.



Trustee's Exhibit No. 10—(Continued)

Subscribed and sworn to before me this 9th day of April, 1948.

[Seal]      /s/ MARGARET L. DAVIS,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 12, 1948, Superior Court.

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of AL HERD, Bankrupt,  
Plaintiff,

vs.

JOSEPH G. WHITE, et al.,  
Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly for trial on March 14, 1949, in Department 58 of the above-entitled court and during the trial was transferred to Department 19 of the above-entitled court, the Honorable Clarke Edwin Stephens, judge presiding, sitting without a jury, a jury having been expressly waived. Marvin Wellins and Daniel A. Weber, appeared as attorneys for plaintiff, and Fred Horo-

## Trustee's Exhibit No. 10—(Continued)

witz and Alvin F. Howard appeared as attorneys for defendants. The cause was tried on March 14, 15, 16, 17, 30, 31; April 4, 5, 6, 8, 11, 12, 13 and 15, 1949. Evidence both oral and documentary was introduced on behalf of plaintiff and defendants, and the court having considered the evidence and heard the arguments of counsel and being fully advised, makes the following findings of fact:

## I.

That the allegations of paragraph I, II, III, IV and V of the complaint are true.

## II.

That it is true that on or about November 27, 1945, one A. F. Rosen and Gertrude Rosen, as sublessors, and the bankrupt, as sublessee, entered into a written sublease, bearing said date, whereby said sublessor leased unto said sublessee the buildings and premises located at and commonly known as 7077 Sunset Boulevard in the City of Los Angeles, State of California, for a term commencing on said date and expiring on January 31, 1947, with an option therein contained in favor of said sublessor for an additional year thereafter.

## III.

It is true that pursuant to the terms of said lease, the term thereof was extended for an additional year.

Trustee's Exhibit No. 10—(Continued)

IV.

It is not true that in and during the month of May, 1947, or at any other time or at all, the bankrupt and the defendant, Joseph G. White, entered into any oral agreement of partnership of any nature whatsoever.

V.

That each and all of the allegations of paragraph X of the complaint are untrue.

VI.

That each and all of the allegations of paragraph XI of the complaint are untrue.

VII.

That the allegations of paragraphs XII and XIII of the complaint are untrue.

VIII.

It is not true that there existed any partnership agreement between defendant White and the bankrupt.

IX.

That the allegations of paragraph XIV of the complaint are untrue.

X.

All of the allegations of paragraph XV are untrue, except it is true that a corporation was organized under the laws of the State of California, known as "Angel Motors"; that the name of said

Trustee's Exhibit No. 10—(Continued)  
corporation was subsequently changed to "Filmland Motors," named as one of the defendants herein.

#### XI.

That the allegations of paragraphs XVI, XVII and XVIII are untrue.

#### XII.

It is true that the defendant, Filmland Motors, occupied the premises theretofore occupied by the bankrupt, pursuant to a lease obtained by said defendant, Filmland Motors. That all of the other allegations of paragraph XIX are untrue.

#### XIII.

That the allegations of paragraph XX are untrue.

#### XIV.

It is true that defendant White has not paid any of the debts of the bankrupt. It is true that the defendant White did not contribute to any alleged partnership the sum of \$65,000.00, or any part thereof. It is not true that the defendant White agreed to contribute to any partnership as agreed capital contribution, or otherwise, the sum of \$65,000.00, or any part thereof, or any other sum.

#### XV.

It is true that at the date of the filing of the petition in bankruptcy against the bankrupt, to wit, August 6, 1947, there existed debts and liabilities of the bankrupt in excess of \$50,000.00. It is

Trustee's Exhibit No. 10—(Continued)

not true that said debts were partnership debts.

XVI.

It is not true that there was any partnership agreement, written or oral, between the bankrupt and defendant White.

XVII.

It is not true that by reason of any act or conduct on the part of defendants White and Film-land Motors, or either of them, the business and good-will of the bankrupt have been totally or partially destroyed.

XVIII.

It is true that Al Herd, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles, and it is further true that the sublease between Rosen and Film-land Motors expired on January 31, 1948, and that neither of the defendants has had possession of said premises from and after said date.

XIX.

It is true that the defendant White has not rendered to the bankrupt or plaintiff any accounting of any nature whatsoever.



## Trustee's Exhibit No. 10—(Continued)

From the Foregoing Findings of Fact, the Court  
Makes the Following Conclusions of Law:

## I.

The plaintiff is entitled to take nothing against  
the defendants or either of them.

## II.

That the defendants are entitled to a judgment  
against the plaintiff for their costs and disburse-  
ments herein.

Dated: May 16, 1949.

/s/ CLARKE EDWIN STEPHENS,  
Judge of the  
Superior Court.

By Designation and Assignment.

[Endorsed]: Filed May 16, 1948, Superior  
Court.

Trustee's Exhibit No. 10—(Continued)

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 542157

FRANCIS F. QUITTNER, as Trustee in Bank-  
ruptcy of AL HERD, Bankrupt,

Plaintiff,

vs.

JOSEPH G. WHITE, et al.,

Defendants.

JUDGMENT

This cause came on regularly for trial on March 14, 1949, in Department 58 of the above-entitled court and during the trial was transferred to Department 19 of the above-entitled court, the Honorable Clarke Edwin Stephens, judge presiding, sitting without a jury, a jury having been expressly waived. Marvin Wellins and Daniel A. Weber appeared as attorneys for plaintiff, and Fred Horowitz and Alvin F. Howard appeared as attorneys for defendants. The cause was tried on March 14, 15, 16, 17, 30, 31; April 4, 5, 6, 8, 11, 12, 13 and 15, 1949. Evidence both oral and documentary was introduced on behalf of plaintiff and defendants, and the cause having been submitted for decision and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law, It Is Hereby Ordered, Adjudged and Decreed:

## Trustee's Exhibit No. 10—(Continued)

## I.

That plaintiff, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, take nothing against the defendants Joseph G. White and Film-land Motors, a California corporation.

## II.

That defendants, Joseph G. White and Film-land Motors, do have and recover of and from the plaintiff, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, bankrupt, their costs and disbursements taxed in the sum of \$11.00.

Dated: May 16, 1949.

/s/ CLARKE EDWIN STEPHENS,  
Judge of the  
Superior Court.

By Designation and Assignment.

[Endorsed]: Filed and entered May 16, 1949,  
Superior Court.

[Endorsed]: Filed October 4, 1949. (Exhibit  
No. 10.)

TRUSTEE'S EXHIBIT No. 12

In the District Court of the United States for the  
Southern District of California, Central Division

In Bankruptcy No. 45176

In the Matter of

AL HERD,

Bankrupt.

STIPULATION WITHDRAWING CLAIM OF  
GEORGE L. GIBBONS

Whereas, by order of Honorable Benno M. Brink, Referee in Bankruptcy, dated May 25, 1948, Francis F. Quittner, as Trustee in Bankruptcy of Al Herd, Bankrupt, was authorized to settle and compromise the action heretofore brought by said Trustee against George L. Gibbons in the United States District Court, Southern District of California, Central Division, bearing case No. 7870-Y, upon payment by said Gibbons to the Trustee of the sum of \$3,000.00 in cash, and upon execution by said Gibbons of an assignment to said Trustee of all his right, title and interest in and to any recovery by said Gibbons in an action now pending in the Superior Court of Los Angeles County, State of California, bearing case No. 533306; and

Whereas, by the terms of said settlement it was provided that the claim hereinafter mentioned, filed in these proceedings, be withdrawn without prejudice to any rights which the said George L. Gibbons may have against the bankrupt personally;

It Is Hereby Stipulated and Agreed by the undersigned that the claim of George L. Gibbons in the sum of \$19,500.00, heretofore filed with the Referee in Bankruptcy in these proceedings, be, and the same is hereby withdrawn without prejudice to any rights which said claimant may have against the bankrupt personally.

Dated: June 23, 1948.

MARVIN WELLINS, and

DANIEL A. WEBER,

By /s/ DANIEL A. WEBER,  
Attorneys for Trustee.

CARL TISOR, and

GEORGE M. WIENER,

By /s/ GEORGE M. WIENER,  
Attorneys for Claimant.

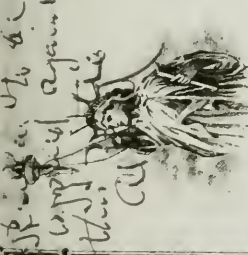
It is so ordered. July 14, 1948.

/s/ BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed July 14, 1948, B. M. Brink,  
Referee.

[Endorsed]: Filed January 27, 1950. (Exhibit  
No. 12.)





after date, without grace 9  
 promise to pay to the order of Joe Lubette.  
 Fifty Dollars and 4/100 Dollars  
 for Value received, with interest from date at the rate of \_\_\_\_\_ percent per annum until paid  
 Principal and interest payable in Lawful Money of the United States  
 at \_\_\_\_\_  
 and in case suit is instituted to collect this note or any portion thereof, \_\_\_\_\_ promise to  
 pay such additional sum as the Court may adjudge reasonable as Attorneys fees in said suit.

No. Duob 19-47

Ed. Kuhl.  
 7177 Street Blvd

Endorsed : Filed July 20, 1950.

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\$5000<sup>00</sup> after date, without grace May 19th 1947  
 Thirty  
 promise to pay to the order of L. L. Lippold  
 Five Thousand and 00/100 Dollars  
 For Value received, with interest from date at the rate of \_\_\_\_\_ percent per annum until paid  
 Principal and interest payable in Lawful Money of the United States  
 at \_\_\_\_\_  
 and in case suit is instituted to collect this note or any portion thereof \_\_\_\_\_  
 pay such additional sum as the Court may adjudge reasonable as Attorneys fees in said suit.

HERKON  
 Clerk of the Court  
 County of \_\_\_\_\_  
 State of \_\_\_\_\_

No. #1 - Duob June 19  
 [Endorsed]: Filed July 20, 1947

Witness: William Blount

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 78, inclusive, contain the original Petition for Involuntary Bankruptcy; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Petition for Review of Order in re Demand of Joseph G. White for Repayment of Money Paid to Trustee in Bankruptcy; Petition to Quiet Title to Funds in the Possession of the Trustee; Order to Show Cause to Quiet Title to Funds in Possession of Trustee; Amended Answer to Order to Show Cause; Trustee's Reply to Amended Answer to Respondent White in Proceedings to Quiet Title; Findings of Fact and Conclusions of Law in Proceedings to Quiet Title; Order Approving Trustee's Petition to Quiet Title to Funds in Trustee's Possession; Petition for Review; Order Affirming Referee Brink's Order Dated April 5, 1950, Quieting Trustee's Title to Funds in His Possession; Notice of Appeal; Statement on Cash Deposit, etc.; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Record on Appeal and Appellee's Designation of Additional Matters and Portions to be Contained in Record on Appeal which, together with Original Trustee's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 16C and 16H and White's Exhibit 2, and original reporter's transcripts of proceedings

on October 4, 1949, January 27 and 31, 1950, in three volumes, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9th day of February, A.D. 1951.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 12850. United States Court of Appeals for the Ninth Circuit. Joseph G. White, Appellant, vs. Francis F. Quittner, Trustee in Bankruptcy of the Estate of Al Herd, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 12, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.